No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Arnold Wayne McCartney, *Petitioner*,

v.

Donald Ames, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FILED: March 18, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7197
(3:22-cv-00103-GMG)

ARNOLD WAYNE MCCARTNEY

Petitioner - Appellant

v.

DONNIE AMES, Superintendent, Mount Olive Correctional Complex and Jail

Respondent - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

FILED: February 18, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7197
(3:22-cv-00103-GMG)

ARNOLD WAYNE MCCARTNEY

Petitioner - Appellant

v.

DONNIE AMES, Superintendent, Mount Olive Correctional Complex and Jail

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7197

ARNOLD WAYNE MCCARTNEY,

Petitioner - Appellant,

v.

DONNIE AMES, Superintendent, Mount Olive Correctional Complex and Jail,

Respondent - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, District Judge. (3:22-cv-00103-GMG)

Submitted: January 17, 2025 Decided: February 18, 2025

Before WILKINSON and GREGORY, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Jeremy Benjamin Cooper, BLACKWATER LAW, PLLC, Pittsburgh, Pennsylvania, for Appellant. Andrea Nease Proper, Michael Ray Williams, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Arnold Wayne McCartney seeks to appeal the district court's orders accepting the recommendation of the magistrate judge and denying relief on McCartney's 28 U.S.C. § 2254 petition, and denying his motion for reconsideration. The orders are not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that McCartney has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

ARNOLD WAYNE MCCARTNEY,

Petitioner,

v. **CIVIL ACTION NO.: 3:22-CV-103 (GROH)**

DONNIE AMES, Warden,

Respondent.

ORDER DENYING MOTION TO RECONSIDER

Currently pending before the Court is the Petitioner's Rule 59(e) Motion to Alter or Amend Judgment including issuance of certificate of appealability [ECF No. 19], filed on October 25, 2023. Rule 59(e) provides that a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The Plaintiff has timely filed his motion to reconsider.

The Fourth Circuit has held that a "Rule 59(e) motion may only be granted in three situations: '(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.' Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (citations omitted). It is an extraordinary remedy that should be applied sparingly. EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997)." Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 378 (4th Cir. 2012).

The Court has reviewed the Plaintiff's motion and found no clear error of law as

the Petitioner's suggests. Moreso, the Motion appears to really be asking the Court to reconsider its decision not to issue a certificate of appealability. Either way, the Court has reviewed its Order and finds no basis to grant the Petitioner's Rule 59(e) Motion.

Accordingly, the Petitioner's Motion is **DENIED**. ECF No. 19.

The Clerk of Court is **DIRECTED** to transmit copies of this Order to all counsel of record herein.

DATED: October 26, 2023

GINA M. GROH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

ARNOLD WAYNE MCCARTNEY,

Petitioner,

v. **CIVIL ACTION NO.: 3:22-CV-103 (GROH)**

DONNIE AMES, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation ("R&R") of United States Magistrate Judge Robert W. Trumble. ECF No. 12. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Trumble for submission of a proposed R&R. Judge Trumble issued his R&R on May 25, 2023. In the R&R, he recommends that the Petitioner's § 2254 Petition [ECF No. 1] be denied and dismissed with prejudice.

I. LEGAL STANDARDS

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court is required to make a de novo review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. Thomas v. Arn, 474 U.S. 140,

150 (1985). Failure to file timely objections constitutes a waiver of de novo review and of a Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Moreover, "[w]hen a party does make objections, but these objections are so general or conclusory that they fail to direct the district court to any specific error by the magistrate judge, de novo review is unnecessary." Green v. Rubenstein, 644 F. Supp. 2d 723, 730 (S.D. W. Va. 2009) (citing Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982)).

Objections to Magistrate Judge Trumble's R&R were due within fourteen days of its filing. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Petitioner is represented by counsel, and the R&R was filed on May 25, 2023. ECF No. 12. The Petitioner timely filed Objections on June 30, 2023. ECF No. 16. The Respondent filed a Response to the Petitioner's Objections on July 13, 2023. ECF No. 17. Accordingly, the Court will review the portions of the R&R to which the Petitioner objects *de novo*. The Court reviews the remainder of the R&R for clear error.

II. DISCUSSION

1. First Objection

The Petitioner objects to the R&R's "faulty reasoning" in "suggesting that a properly conducted mercy phase would be unlikely to result in a mercy recommendation because of the overwhelming nature of the State's evidence . . . ." ECF No. 16 at 1. In support, the Petitioner cites two Ninth Circuit cases.

The Petitioner mischaracterizes the R&R's analysis. The Petitioner should have clarified what he means by a "properly conducted mercy phase" because according to the

R&R, the mercy phase was properly conducted. Presuming the Petitioner is referring to trial counsel's strategy, tactics, and performance, the R&R does not say that the "prosecution's evidence during the guilt phase does not excuse a failure to mitigate at sentencing." Id.

In the context of the Strickland standard, the R&R says,

> Petitioner cannot meet the second prong, which requires him to demonstrate that but for counsel's decision, the result of the mercy phase would reasonably have changed. In light of the evidence presented during the guilt phase, it is unlikely that any testimony by family and friends would reasonably establish that Petitioner was a peaceful person, and that his conduct on the night he killed Vickie Page merited a finding of mercy.

ECF No. 12 at 29–30.

The Undersigned agrees. Similarly, the state habeas court found the Petitioner could meet the first Strickland prong, but he is unable to meet his burden on the second. The Petitioner shot his fiancé, Vickie Page, in the face, instantly killing her, in the presence of their four-month-old son. The jury convicted him of murder in the first degree, and the same jury that heard the evidence in his case was then tasked with determining whether he should receive mercy.

Trial counsel claims there was an agreement with the prosecutor to limit the Petitioner's witnesses to only the Petitioner in exchange for the State not calling character witnesses who would testify unfavorably to the Petitioner's case. Id. Specifically, the R&R notes this agreement prevented the State from calling a woman who would testify that the Petitioner threatened to cut her throat with a knife and let her bleed out in the driveway. Id. at 29. This testimony would be exceptionally damaging to the Petitioner's plea for mercy after being convicted of murdering his fiancé.

While recognizing the Petitioner can satisfy the first Strickland prong, the Court

finds that he has not demonstrated that but for counsel's ineffectiveness, the outcome here would be any different. The jury returned with its no mercy recommendation in little over ten minutes. The evidence at trial—only considering what Petitioner readily conceded—was that he was arguing with his fiancé, went and retrieved a pistol he "usually ke[pt] some rounds in" and pointed it at her face to scare her when he "accidentally pulled the trigger." ECF No. 12 at 3.

The reality of this Court's experience is that the Petitioner's multitude of character witnesses, friends, families, and programming certificates earned while the Petitioner was awaiting trial *might* cause the jury pause before reaching its mercy determination. But, this Court cannot and does not find that but for counsel's decisions, the result of the mercy phase would reasonably have changed.

This objection is **OVERRULED** for several reasons. It mischaracterizes the R&R's analysis and findings and cites unpersuasive law that is not controlling in this circuit. Finally, the Undersigned adopts the R&R's analysis with respect to these arguments.

2. Second Objection

The Petitioner objects to the R&R's "fail[ure] to contend with the Petitioner's argument that [a portion of the State court's reasoning] was unreasonable and unsustainable." ECF No. 16 at 2. The Petitioner avers that the State court erred in rejecting his argument that he is entitled to relief under Wiggins and Shelton—and the R&R does not address this argument. As the Respondent points out, this argument is clearly addressed in the R&R. ECF No. 12 at 28; 36–37. The R&R clearly and correctly addressed why the Petitioner is not entitled to relief under Wiggins, and the Undersigned finds that Petitioner's second objection only claims it was not addressed. Thus, no further

discussion is required. As to Shelton, that case is so distinguishable from the instant case, it hardly requires discussion.

In Shelton, the Supreme Court of Appeals of West Virginia found counsel's mercy phase performance lacking to an extent that Shelton was denied effective assistance of counsel. However, in Shelton's case, his trial attorney "expressed his personal opinion that he did not know whether or not the appellant even deserved mercy[; suggested] it was his *duty,* or *his job* to ask for mercy[;] reminded the jury that [it] had no obligation to award mercy; [and told them,] 'If there was ever a time for vengeance, this could be it.'" State ex rel. Shelton v. Painter, 221 W. Va. 578, 585, 655 S.E.2d 794, 801 (2007). The trial attorney's deficiencies in Shelton are fundamentally different than what is before this Court—as more fully explained in the R&R. The second objection is **OVERRULED**.

3. Third Objection

The Petitioner argues that the state habeas courts failed to properly characterize and consider various programming certificates he earned between his arrest and conviction: Certificate of Baptism; Handling Anger; Settling Rules and Limits; Building Trust; A Cognitive-Behavior Workbook; Anger, Power, Violence and Drugs; Becoming Whole ~ Book 3; Growing up Male ~ Book 1; Managing Money; Refusal Skills; Values & Personal Responsibility; and Hygiene & Self Care; Making Decisions. ECF No. 1-2 at 98–110. Except for his Baptism Certificate, the Petitioner's certificates are all dated between September 9, 2009, and October 1, 2009. The Petitioner was convicted of murder in the first degree on February 12, 2010.

Contrary to this objection, the R&R does discuss this evidence that was not presented during the mercy phase. The Petitioner also takes issue with the state habeas

courts' incorrect finding about when he earned these certificates. The Petitioner is correct that the dates on these certificates are prior to his conviction, and it appears they were earned while in a pretrial status.

These certificates offer some value in attempting to present a mitigation case on the Petitioner's behalf, but do not deserve the weight Petitioner assigns them. Taken in the context explained in the R&R, the Undersigned finds the certificates' value rather limited in mitigation. They would show the jury that the Petitioner took advantage of some programming available during his incarceration. Although, based on the dates of the certificates, it appears they were all earned in a short timeframe despite the Petitioner's lengthy pretrial incarceration. Further, this Court cannot find that the state habeas courts' incorrect finding as to when the Petitioner earned these certificates is material or significant enough to warrant a different outcome. The objection is **OVERRULED**.

4. Fourth Objection

The Petitioner suggests the R&R erroneously found that trial counsel developed a mitigation case. ECF No. 16 at 4. Further, the Petitioner argues that the R&R should have found that the state courts unreasonably applied Wiggins to this case.

Trial counsel did strategize and present a mitigation case. Was it the best strategy or mitigation case? No. It is clear to this Court that trial counsel's tactics were lacking in the mercy phase. Nonetheless, the record does not offer the sort of error the Supreme Court decried in Wiggins. Here, trial counsel attempted a strategy that did not work and likely was not the best strategy. That is not in question. But, the evidence is not that they failed to develop a strategy or go into the mercy phase without any mitigation plan. Therefore, this objection is **OVERRULED**.

5. Fifth Objection

The Petitioner's fifth objection cursorily takes issue with the R&R's application of the Cronic standard. The specific portion of this objection argues that trial counsel was deficient for failing to make a request for mercy during the mercy phase. During the state habeas proceedings, trial counsel explained that under the supposed agreement with the prosecutor, trial counsel believed the only evidence they could put on (to uphold their end of the bargain) was the Petitioner. Thus, counsel made no statement. However, the Court notes that toward the end of trial counsel's questioning of the Petitioner during the mercy phase, counsel asked him, "[a]re you asking this jury to extend you mercy?" ECF No. 1-3 at 416. Thus, as further explained in the R&R, the Petitioner has not demonstrated that he is entitled to relief under the Cronic standard, and the objection is **OVERRULED**.

6. Sixth Objection

The final objection claims the R&R's "conclusions regarding the Petitioner's guilt-phase claim concerning the failure of trial counsel to obtain an expert on diminished capacity entirely fail to contend with the state court habeas record, . . . and are utterly conclusory. (ECF No. 12, at 40-44)." It strains credibility that "utterly conclusory" conclusions span four pages. To the contrary, the R&R adequately and squarely addresses the Petitioner's arguments.

The Petitioner takes issue with the Magistrate Judge supposedly not "acknowledging or refuting any of the extensive expert testimony establishing the sort of evidence that could have been offered had trial counsel obtained an expert witness." ECF No. 16 at 4. The R&R explained, "despite lengthy argument as to Petitioner's wish that his counsel had pursued expert testimony, and how such expert testimony might have

benefited his defense, Petitioner fails to explain how the State court unreasonably applied Strickland as to his claims regarding a diminished capacity expert." ECF No. 12 at 40.

The Petitioner makes several arguments here about what trial counsel could and should have done in this case. But, the reality is—as the R&R notes—there is little, if any, meaningful discussion as to how he can meet the standards articulated in § 2254. As the Undersigned has reviewed the Petitioner's argument, trial counsel (rightly or wrongly) was concerned about opening a 404(b) door if they obtained an intoxication expert. Instead, they relied upon the ample, copious even, evidence in the record that the Petitioner was very intoxicated when he shot his fiancé in her face. The prosecutor's witnesses and evidence proved up intoxication, and as the Petitioner notes here, trial counsel was able to obtain an intoxication instruction in the absence of any expert testimony. Because there is no basis whatsoever to sustain this objection, it is **OVERRULED**.

III. CONCLUSION

Accordingly, finding that Magistrate Judge Trumble's R&R carefully considers the record and applies the appropriate legal analysis, it is the opinion of this Court that Magistrate Judge Trumble's Report and Recommendation [ECF No. 12] should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated therein.

Thus, the Respondent's Motion to Dismiss or for Summary Judgment is **GRANTED** [ECF No. 9], and the Petitioner's Petition is **DISMISSED WITH PREJUDICE**. ECF No. 1. This case is **ORDERED STRICKEN** from the Court's active docket.

The Petitioner **has not met the requirements for issuance of a certificate of appealability**. A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

If a district court denies a petitioner's claims on the merits, then "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

"If, on the other hand, the denial was procedural, the petitioner must show 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" United States v. McRae, 793 F.3d 392, 397 (4th Cir. 2015) (quoting Slack, 529 U.S. at 484). Here, upon a thorough review of the record, the Court concludes that the Petitioner has not made the requisite showing.

The Clerk of Court is **DIRECTED** to transmit a copy of this Order to all counsel of record herein.

DATED: September 28, 2023

GINA M. GROH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG

ARNOLD WAYNE MCCARTNEY,

Petitioner,

v. **Civil Action No. 3:22-CV-103 (GROH)**

DONNIE AMES, Warden,

Respondent.

REPORT AND RECOMMENDATION[1]

I. INTRODUCTION

On June 9, 2022, Petitioner, an inmate at Mount Olive Correctional Complex, by counsel, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, along with a memorandum and exhibits in support thereof. ECF Nos. 1, 1-1 through 1-9. The matter is now before the undersigned United States Magistrate Judge for a Report and Recommendation to the District Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule of Prisoner Litigation Procedure ("LR PL P") 2.

[1] Unless otherwise noted, all Electronic Case Filing ("ECF") Numbers cited herein refer to the instant case, Case No. 3:22-CV-103.

II. FACTUAL AND PROCEDURAL HISTORY

A. Conviction and Sentence

On March 2, 2009, Petitioner was charged in the Circuit Court of Lewis, West Virginia, case number 09-F-8, with first degree murder of Vicki[2] Page. ECF No. 1-2 at 2. Petitioner was found guilty by a jury of first degree murder in on February 18, 2010. ECF No. 1 at 1 – 2, see ECF Nos. 1-2 at 11; 1-6, State v. McCartney, 228 W. Va. 315, 719 S.E.2d 785 (2011) ("McCartney I"). The facts of the killing were described in the opinion from Petitioner's direct appeal:

> On December 20, 2008, the petitioner was arrested at his home in Lewis County, West Virginia, for shooting his fiancée, Vickie Paige (hereinafter, the "victim"), in the head at point blank range with a Wesson Firearms Model 41 revolver. The victim was killed instantly. At the time of the shooting, the couple's four-month-old-son was in another room of the home.
>
> Brian Joseph[3], a friend of the petitioner who had been staying with the petitioner and victim, was not present when the shooting occurred. Mr. Joseph, however, was at the home approximately thirty minutes prior to the victim's murder. At trial, Mr. Joseph explained that he was sitting in the living room and heard several "thumping" noises that sounded like a heavy object hitting the floor and wall of the bedroom where the petitioner and the victim were located. Believing that the petitioner was being physically abusive to the victim, Mr. Joseph looked in the bedroom and noticed the victim on the floor. Mr. Joseph then confronted the petitioner about what he was doing and said, "Arnie, please don't." According to Mr. Joseph, the petitioner became angry. He explained that
>
> > it was like a switch went off, he throwed his beer at me and I turned around and went back through the kitchen and he picked up a stack of dishes to throw at me. They hit the sink and I didn't stop, I just—I went right on

[2] The correct spelling of the victim's name is "Vickie Page". In the indictment her name was misspelled as "Vicki Page". ECF No. 1-2 at 2. This discrepancy was the source of an objection at trial. The victim's name has also been misspelled in other court filings as "Vickie Paige".

[3] Brian Joseph is also called Barney Joseph. ECF No. 9-16 at 28 – 29.

> around the playpen and jumped out the front door, which there ain't no steps there, so—and I didn't stop, I just went down to the neighbor's house.

Approximately thirty minutes after Mr. Joseph left the trailer, the petitioner, with blood on his hands and shoes, walked to a neighbor's trailer and stated, "I just shot my Vickie." The neighbor provided a statement to the police detailing the petitioner's actions. He indicated that the petitioner was calm and was drinking beer from a can that was covered in blood.

The police were called to the scene and the petitioner was arrested for murder. The petitioner was read his *Miranda* rights and he then gave a lengthy recorded statement to the chief investigating officer. During the statement, the petitioner admitted that he shot and killed the victim, but claimed that the shooting was an accident. The petitioner stipulated to the admissibility of this statement at his trial. The petitioner also provided a handwritten statement at that time. In the statement, he explained that:

> Me and Vichy [sic] got into it about my truck being broke down.... We started arguing and fighting.... The baby was sitting in the blue chair in front of the stove. She (Vichy) [sic] was in the bedroom sitting on the bed. I went to get the pistol which was in the gun cabinet. The cabinet is in the front room. The pistol is a 41 Magnum. I don't know how many rounds were in the pistol. I usually keep some rounds in it. Then I went to the bedroom. She set down on the bed and we were still arguing. I was standing in front of her. I pointed the gun at her. I didn't think it would go off. I accidentally pulled the trigger.

After providing that statement, and while the petitioner was being transported to the regional jail, he made additional comments to the transporting State Trooper warning him to "never let your friends move in with you," and "I think she was fu* *ing him," referring to the victim and Mr. Joseph.

The day after the petitioner was arrested, the chief investigating officer interviewed him a second time at the regional jail, prior to his previously scheduled arraignment before a magistrate. The petitioner was again given the *Miranda* warnings and he provided the officer with a lengthy digital recording which was condensed to a handwritten

> summary. Consistent with his written statement provided the prior evening, the petitioner maintained that he only intended to scare the victim and that he accidentally pulled the trigger and shot her in the head. The petitioner said that prior to the shooting, he thought the victim might be "cheating" on him with Mr. Joseph because she "used to ... want a whole lot to do with me when we went to bed and stuff and here lately, she just-she just acted like she didn't want that much to do with me." He also explained that "[i]t did kind of aggravate me a little bit when [Mr. Joseph] came in there and asked me if everything was all right." The petitioner then stated that he and the victim
>
> > got into it ... got to arguing back and forth a little bit ... we got to arguing and fighting and I went in there and got my damn pistol ... just to scare her ... and then she sat down on the bed and she kept arguing and I said, 'Well, I don't want to hear it.' We, you know, kept arguing. And I just pointed it at her, you know, and didn't think it was going to go off and I accidentally pulled the trigger.
>
> The petitioner acknowledged that he ordinarily kept the gun loaded. He further said that he "blacked out" for a short period of time after the shooting. He also asked the investigating officer, "what do you think I am going to get out of this.... Do you think they'll cut me any slack at all?"

ECF No. 1-6, State v. McCartney, 228 W. Va. at 321–22, 719 S.E.2d at 791–92.

Following his conviction, Petitioner testified on his own behalf in the mercy phase, however, the jury denied Petitioner's request for mercy. Based on that recommendation, the Circuit Court sentenced the Petitioner to life imprisonment without mercy, making him ineligible for parole. ECF Nos. 1-2 at 13; 1-6 at 5, 228 W.Va. at 323, 719 S.E.2d at 793.

B. Direct Appeal

The defendant filed a direct appeal in the West Virginia Supreme Court of Appeals ("WVSCA" or "Supreme Court of Appeals"). McCartney v. State, 228 W. Va. 315, 719

S.E.2d 785 (2011). Nine[4] issues are addressed in the opinion: (1) that Petitioner's trial was not held within the same term of court, in violation of the one-term rule [228 W.Va. at 323, 719 S.E.2d at 793]; (2) that Petitioner's second statement made at the regional jail violated the prompt presentment rule [Id. at 325, 795]; (3) there was insufficient chain of custody evidence to support admission of the murder weapon into evidence [Id. at 327, 797]; (4) that the coroner's testimony was insufficient evidence to establish that the victim's cause of death was a gunshot to the head [Id.]; (5) that he was denied an opportunity to present a closing argument in the mercy phase [Id. at 328, 798]; (6) that the jury instruction on first degree murder was inadequate [Id. at 329, 799]; (7) that the prosecutor made an improper comment during closing argument [Id. at 331, 801]; (8) that the indictment was defective because the victim's name was misspelled as "Vicki Page" instead of "Vickie Page" [Id. at 332, 802]; and (9) that there was insufficient evidence to convict Petitioner [Id. at 333, 803].

On November 17, 2011, the WVSCA affirmed the judgment of the Circuit Court of Lewis County entered on May 10, 2010. Id. at 334, 804.

C. State Habeas Petition

On January 22, 2013, Petitioner, acting pro se, filed a petition for habeas corpus relief in the Circuit Court of Lewis County, case number 13-C-12. ECF Nos. 9-6, 9-7 at 2. Petitioner was appointed counsel and filed an amended petition for habeas corpus on October 12, 2016. ECF Nos. 9-7, 9-11 at 1. In his amended petition, Petitioner asserted his Constitutional rights were violated because his trial attorneys were ineffective when they failed to: (1) conduct adequate voir dire on the issue of mercy; (2) adequately cross

[4] Elsewhere in the opinion, the Court describes Petitioner as raising seven [228 W.Va. at 321] and ten [228 W.Va. at 323] arguments, however, nine arguments are addressed on the merits by the Court.

examine and impeach witnesses; (3) introduce mitigating evidence, or make any argument during the mercy phase; (4) draft or propose adequate jury instructions related to his defense that the shooting was accidental; (5) consult or retain an expert witness on competency, criminal responsibility, and diminished capacity; (6) consult or retain an expert witness regarding firearms, ballistics or forensic pathology; and (7) investigate and secure the attendance of witnesses in the guilty and mercy phases of the trial. ECF Nos. 9-7 at 2 – 3; 9-11 at 3 – 4. This petition was denied by the circuit court on February 18, 2020. ECF No. 9-11.

The circuit court addressed each of Petitioner's grounds for relief[5] in its order denying the writ of habeas corpus, including:

> 1. Mental competency at the time of the crime or incompetence at time of offense as opposed to time of trial [Id. at 6];
>
> 2. Denial of counsel [Id. at 7];
>
> 3. Unfulfilled plea bargain [Id.];
>
> 4. Ineffective assistance of counsel in the guilt and mercy phases, specifically for:
>
> a. Failure to use an expert witness for the defense of diminished capacity or voluntary intoxication;
> b. Ineffective cross examination and impeachment of State's witnesses;
> c. Failure to draft or propose a jury instruction related to accidental shooting and failure to use a ballistics expert;
> d. Failure to object to prejudicial statements of the prosecutor; and
> e. Failure in the mercy phase to argue for mercy, or present mitigating evidence or testimony on Petitioner's behalf [Id. at 8];

[5] Although the order summarizes Petitioner's arguments as listed above, the order addresses the grounds in the order listed herein, including grounds raised by Petitioner during the omnibus hearing, but not in the pleadings. ECF No. 9-11 at 5.

5. Refusal to subpoena witnesses [Id. at 18];

6. Jury instructions [Id.]; and

7. Insufficiency of the evidence [Id. at 19].

ECF No. 9-11. In its order denying relief, the court found that:

> Based on the totality of the circumstances, Trial Counsel['s] performance during the mercy phase of trial was wholly inadequate. Trial counsel failed to prepare Petitioner to testify at the mercy phase of trial, failed to prepare any witnesses to testify on petitioner's behalf, and failed to ask the jury for mercy for their client. Trial counsel claims the decision was made not to give an opening or closing statement based upon their agreement with the Prosecutor that petitioner would be the only testimony and evidence presented at the mercy phase of trial. This "agreement" was not memorialized in writing or put on the record, leaving the details a mystery. Even if the failure to make an opening or closing statement was by some agreement, this court concludes that it is not a reasonable strategy to fail to request mercy on behalf of your client.

ECF No. 9-11 at 16; McCartney v. Ames, No. 20-0242, 2021 WL 2581725, at *3 (W. Va. June 23, 2021) ("McCartney II"). However, the court found that Petitioner was unable to meet the second prong of Strickland:

> In the present case there has been no evidence presented that counsel's failure to argue either in opening or closing of the mercy stage would significantly change the outcome of the mercy phase. This Court is unaware of any additional information that would have been adduced at trial in this matter, which could have been used as a verbalization of a request for mercy and that would have created a "reasonable probability" of a different outcome in this matter.

ECF No. 9-11 at 17 – 18; McCartney v. Ames, 2021 WL 2581725, at *3.

On June 2, 2020, Petitioner appealed the denial of habeas corpus to the WVSCA, in that Court's docket 20-0242. ECF No. 9-12. The appeal raised three assignments of

error by the circuit court: (1) when it denied habeas relief based on ineffective assistance of counsel during the mercy phase; (2) when it denied habeas relief based on ineffective assistance of counsel for failure to obtain expert witnesses to support a diminished capacity, or other defense; and (3) through its cumulative error. Id. at 4. By unpublished memorandum decision issued on June 23, 2021, the Supreme Court of Appeals affirmed the decision of the Lewis County Circuit Court, and addressed each of Petitioner's claims. ECF No. 9-14; 2021 WL 2581725. As to his first claim, that Petitioner received ineffective assistance of counsel during the mercy phase of his trial, the Court found:

> Due to the overwhelming strength of the evidence presented against petitioner during the guilt phase, it is not reasonably probable that the result would have been different if counsel had called witnesses during the mercy phase. Moreover, consistent with the circuit court's order, although petitioner's counsel did not make a plea for mercy, the lack of this argument likewise would not have changed the jury's recommendation of no mercy due to evidence presented at trial as to the circumstances surrounding the murder. Thus, this assignment of error is without merit.

ECF No. 9-14 at 4; McCartney v. Ames, 2021 WL 2581725, at *5. As to Petitioner's second claim, that Petitioner received ineffective assistance of counsel when his attorneys failed to retain expert witnesses, the Court wrote:

> Upon our review of the record, the trial court did not err when it failed to grant petitioner habeas corpus relief regarding his ineffective assistance of counsel claim. . . . that counsel was deficient where they failed to obtain [ ] expert witnesses to address his intoxication and his ability to form intent and further failed to obtain a ballistics or firearm expert to establish that the gun accidentally discharged. At the omnibus hearing, trial counsel testified that the decision not to utilize an expert to address his intoxication was a strategic/tactical decision to protect petitioner. Turning to the second prong of the *Miller*[6]

[6] As explained more fully in footnote 9 herein, the Miller test is a West Virginia restatement of the 2-part federal test established in Strickland v. Washington, 466 U.S. 668 (1984), for demonstrating ineffective assistance of counsel.

> test, we agree with the circuit court's determination that "based upon the totality of the evidence presented at trial, ... it is not reasonably probable that expert testimony regarding petitioner's level of intoxication would have changed the results of the jury verdict." Further, petitioner's argument that his trial counsel were ineffective because they did not retain a ballistics/firearms expert at trial is unavailing. At trial, the State presented evidence that petitioner shot the victim in the head at point-blank range with a gun that was shown to be in perfect working order. Based upon this evidence, we fail to see how petitioner could satisfy the second prong of the *Miller* test, as there is no reasonable probability that a firearms expert would have changed the result of the pleadings.

ECF No. 9-14 at 4; McCartney v. Ames, 2021 WL 2581725, at *5. In denying Petitioner's third claim for relief, the Court stated, "[b]ecause we find that there was no error in this case, the cumulative error doctrine does not apply." ECF No. 9-14 at 4; McCartney v. Ames, 2021 WL 2581725, at *6.

D. Instant Federal Habeas Petition

On June 9, 2022, Petitioner's counsel filed a petition for habeas corpus, along with a memorandum and exhibits in support thereof. ECF Nos. 1, 1-1 through 1-9. In his § 2254 petition, Petitioner asserts three grounds for relief, all of which allege that he received ineffective assistance of counsel at trial:

1. During the mercy phase of his trial [ECF No. 1 at 6];

2. When his counsel failed to obtain a diminished capacity expert witness [Id. at 8]; and

3. When his counsel failed to obtain a ballistics expert witness [Id. at 11].

In the accompanying memorandum, Petitioner more specifically argues that he received ineffective assistance of counsel:

1. During the mercy phase of his trial because:

a. Counsel inadequately prepared Petitioner to testify in the mercy phase [ECF No. 1-1 at 17];

b. Counsel failed to assess potential character witnesses who could testify on Petitioner's behalf during the mercy phase [Id.];

c. Counsel prepared no argument and made no argument on Petitioner's behalf in the mercy phase [Id.]; and

d. Counsel failed to establish a diminished capacity defense which could have been used in the guilt phase and argued in the mercy phase [Id. at 17 – 18];

2. When his counsel failed to obtain expert witnesses:

a. In support of a diminished capacity defense, to determine competency to stand trial or criminal responsibility [Id. at 25]; or

b. A ballistics expert to testify that the firearm's discharge could have been accidental [Id. at 32].

Petitioner further argues that the Lewis County Circuit Court and West Virginia Supreme Court of Appeals both relied upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Id. at 19. Petitioner contends that he offered written statements by ten potential character witnesses, and numerous certificates showing his rehabilitative work undertaken in 2009 during pretrial detention. Id.

Petitioner asserts that the Supreme Court of Appeals' decision is contrary to or unreasonably applies the holding of Wiggins v. Smith, 539 U.S. 510 (2003). Wiggins overturned the Fourth Circuit's denial of § 2254 habeas relief when trial counsel failed to sufficiently investigate mitigating factors which had a reasonable probability to change the outcome of the penalty phase. ECF No. 1-1 at 20.

Further, Petitioner claims that Circuit Court incorrectly characterized the record, when: (1) the Circuit Court stated that mitigation evidence did not exist, when the information was known and part of the record, and was not offered in the mercy phase [Id. at 21]; and (2) the Circuit Court stated that Petitioner had only post-conviction rehabilitation evidence to offer in mitigation, when the information was instead about pre-trial rehabilitation programming [Id. at 22].

As to Petitioner's claims that his counsel was ineffective for securing expert witnesses on diminished capacity and ballistics, Petitioner asserts that such witnesses were critical to an effective defense. Id. at 25 – 35. Citing to state precedent, Petitioner contends that expert testimony was necessary for a successful diminished capacity defense, which would have resulted in a maximum sentence of 40 years, with parole eligibility in 10 years. Id. at 26. Petitioner asserts that his blood alcohol level of .22 following his arrest demonstrates both his intoxication and his inability to form the requisite intent to commit first degree murder. However, absent expert opinion testimony, Petitioner contends that such a defense was untenable, regardless of his blood alcohol content (BAC) level. Id. at 26 – 27. Further, Petitioner argues that his trial counsels' assertion that they chose not to engage an expert because they did not want expose Petitioner to the possible introduction of 404(b) evidence, or to have to disclose the findings, was contradicted by trial counsel themselves. Id. at 31 – 35.

Finally, Petitioner contends that a ballistics expert could have testified about any possible malfunctioning of the firearm which would have supported Petitioner's defense that the firearm discharged without him pulling the trigger, and was accidental. Id. at 32 – 33.

On November 14, 2022, Respondent filed a motion to dismiss and for summary judgment, along with a memorandum and exhibits in support thereof. ECF Nos. 9, 9-1 through 9-16, 10. In the memorandum, Respondent argues that:

> 1. Petitioner failed to meet the second prong of the Strickland test that the outcome of the trial would have been different if his counsel had argued for leniency during the mercy phase, instead of just eliciting testimony from Petitioner himself [ECF No. 10 at 14];
>
> 2. Petitioner's trial counsel's decision not to call character witnesses in the mercy phase was based on sound strategic or tactical reasons, including an agreement reached between counsel for the Petitioner and counsel for the State, that if Petitioner did not call character witnesses, the State would not put on evidence of Petitioner's mistreatment of and threats of violence toward other women, and that counsel's actions were "within the wide range of reasonable professional assistance" [Id. at 20 – 23];
>
> 3. Petitioner's trial counsel was not ineffective at the mercy stage because they adequately prepared Petitioner to testify at that phase, and further, Petitioner failed to meet the second prong of Strickland, by demonstrating that the result of the mercy phase would have been different absent counsel's alleged error [Id. at 24 – 26];
>
> 4. Petitioner did not receive ineffective assistance of counsel based on his trial counsel's failure to pursue expert testimony to support a diminished capacity defense or other defenses [Id. at 26 – 31]; and
>
> 5. Petitioner did not meet the second prong of Strickland because he did not show his counsel was ineffective in not securing a ballistics or firearms expert to show the gun discharged accidentally [Id. at 31 – 33].

Petitioner filed a response in opposition to the motion to dismiss and for summary judgment on December 5, 2022. ECF No. 11. Therein Petitioner first contends the motion to dismiss is unsupported by factual assertions in the pleadings, arguing that it is unreasonable to argue that Respondent has been deprived of information about the

nature of the claim and facts which support the claim, or that the claim is implausible on its face. Id. at 1. Second, Petitioner argues that summary judgment is inappropriate because his mercy phase claim under United States v. Cronic, 466 U.S. 648 (1984), was not addressed by Respondent, and because his claims are meritorious as a matter of law. Id. at 2. Third, Petitioner asserts that the record herein and the State court's rulings that he met the first prong of Strickland contradict Respondent's argument on that ground. Id. at 4. Fourth and finally, Petitioner argues that the record does not support Respondent's assertion that trial counsel's trial tactics were intended to protect Petitioner from the introduction of prejudicial 404(b) evidence. Id. at 5.

III. LEGAL STANDARDS

A. Petitions for Habeas Corpus Under 28 U.S.C. § 2254

The provisions of 28 U.S.C. § 2254 require a district court to entertain a petition for habeas corpus relief from a prisoner in State custody, but "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(d).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2); see also Williams v. Taylor, 529 U.S. 362 (2000).

A petitioner can only seek § 2254 relief if he has exhausted the remedies available in state court, the corrective process is not available in state court, or the state process is ineffective to protect the petitioner. 28 U.S.C. § 2254(b).

The Fourth Circuit Court of Appeals has determined that "the phrase 'adjudication on the merits' in section 2254(d) excludes only claims that were not raised in state court, and not claims that were decided in state court, albeit in a summary fashion." Thomas v. Taylor, 170 F.3d 466, 475 (4th Cir. 1999). When a state court summarily rejects a claim and does not set forth its reasoning, the federal court independently reviews the record and clearly established Supreme Court law. Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000), cert. denied, 524 U.S. 830 (2001) (quoting Bacon v. Lee, 225 F.3d 470, 478 (4th Cir. 2000)). However, the court must still "confine [it's] review to whether the court's determination 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id. at 158.

A federal habeas court may grant relief under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or decides a case differently than this Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 364 – 65. A federal court may grant a habeas writ under the "unreasonable application" clause, "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 365. "An unreasonable application of federal law is different from an incorrect application of federal law." Id.

When a Petitioner challenges the factual determination made by a state court, federal habeas relief is available only if the state court's decision to deny post-conviction relief was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). "In reviewing a state court's ruling on post-conviction relief, we are mindful that 'a determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" Tucker v. Ozmint, 350 F.3d 433, 439 (4th Cir. 2003).

However, habeas corpus relief is not warranted unless the constitutional trial error had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Richmond v. Polk, 375 F.3d 309 (4th Cir. 2004). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht, supra.

B. Motions to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a case when a complaint fails to state a claim upon which relief can be granted. The Federal Rules of Civil Procedure require only, "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Courts long have cited, "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

Plaintiff is proceeding *pro se* and therefore the Court must liberally construe his pleadings. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 - 1 (1972) (per curiam); Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007). Although a complaint need not contain detailed factual allegations, a plaintiff's obligation in pleading, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do...." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). Accordingly, "[f]actual allegations must be enough to raise a right to relief above the speculative level," to one that is "plausible on its face." Id. at 555, 570. In Twombly, the Supreme Court found that, "because the plaintiffs [ ] have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. at 570. Thus, to survive a motion to dismiss, a plaintiff must state a plausible claim in his complaint which is based on cognizable legal authority and includes more than conclusory or speculative factual allegations.

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," because courts are not bound to accept as true a legal conclusion couched as a factual allegation. Id. at 678. "[D]etermining whether a complaint states a plausible claim . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. Thus, a well-pleaded complaint must offer more than, "a sheer possibility that a defendant has acted unlawfully," in order to meet the plausibility standard and survive dismissal for failure to state a claim. Id. at 678.

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)). In considering a motion to dismiss for failure to state a claim, a plaintiff's well-pleaded allegations are taken as true, and the complaint is viewed in the light most favorable to the plaintiff. Mylan Labs, Inc. v. Matkari, 7 F.3d1130, 1134 (4th Cir. 1993); see also Martin, 980 F.2d at 952.

C. Motions for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), the Court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In applying the standard for summary judgment, the Court must review all the evidence in the light most favorable to the nonmoving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex, the Supreme Court held that the moving party bears the initial burden of informing the Court of the basis for the motion to, "demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323. Once "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

"The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a verdict." Anderson, supra, at 256. Thus, the nonmoving party must present specific facts showing the existence of a genuine issue for trial, meaning that "a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. The "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment. Id. at 248.

To withstand such a motion, the nonmoving party must offer evidence from which a "fair-minded jury could return a verdict for the [party]." Id. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987). Such evidence must consist of facts which are material, meaning that they create fair doubt rather than encourage mere speculation. Anderson, supra, at 248.

Summary judgment is proper only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita, supra, at 587. "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Id. citing First Ntl. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 289, 88 S.Ct. 155, 1592 (1968). See Miller v. Fed. Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990). Although any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate. Matsushita,

supra, at 587-88. Anderson, supra, at 248-49.

IV. ANALYSIS

All of the issues raised by Petitioner herein have previously been presented to and adjudicated on the merits in State court in the Circuit Court of Lewis County, which decision was affirmed the WVSCA. While it is not the role of this court to act as an appellate court to the West Virginia courts, Petitioner may still be entitled to relief, if he can demonstrate that he meets either of the two subparagraphs of 28 U.S.C. § 2254(d). "In reviewing a state court's ruling on post-conviction relief, we are mindful that 'a determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" Tucker v. Ozmint, 350 F.3d 433, 439 (4th Cir. 2003) (citing U.S.C. §§ 2254(d)(2) and (e)(1).

As discussed more fully below, Petitioner has not demonstrated that the prior State court proceedings were contrary to federal law, or that they were a result of an unreasonable application of federal law. Accordingly, Petitioner has failed to satisfy 28 U.S.C. § 2254(d)(1).

Petitioner has also failed to demonstrate that the state court proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, as Petitioner has failed to satisfy 28 U.S.C. §§ 2254 (d)(1) or (d)(2), and his writ of habeas corpus must be denied.

Petitioner first asserts that the State courts "unreasonably applied the *Cronic* standard, or in the alternative, the *Strickland* standard, regarding trial counsels' conduct surrounding the mercy phase. ECF No. 1-1 at 17. Petitioner next asserts that the circuit

court and the Supreme Court of Appeals "relied on outright incorrect determinations to deny relief—factual findings that rise to the level of 'an unreasonable determination of the facts in light of the evidence presented,'" pursuant to § 2254(d)(2). Id. at 19.

In Cronic, the Supreme Court reversed the Court of Appeals, and held that the Court of Appeals erred when "it inferred that [defendant's] constitutional right to the effective assistance of counsel had been violated." 466 U.S. at 652. That inference was based on five criteria: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. Id. at 652 – 653. The Supreme Court found that Cronic did not receive ineffective assistance of counsel, even though his lawyer's practice was in real estate, his counsel had never tried a criminal case, and counsel had only 25 days to prepare after a four and a half year investigation.[7] Further in Cronic, the Supreme Court summarized its prior holdings on the importance of effective assistance of counsel:

> It has long been recognized that the right to counsel is the right to the effective assistance of counsel. The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham and nothing more than a

[7] The Supreme Court concluded that the other criteria—the gravity of the charge, the complexity of the case, and the accessibility of witnesses—were "all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances, but none identifies circumstances that in themselves make it unlikely that [the defendant] received the effective assistance of counsel." 466 U.S. 666.

> formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.
>
> Thus, . . . the accused is entitled to "a reasonably competent attorney," whose advice is within the range of competence demanded of attorneys in criminal cases. [We have] held that the Constitution guarantees an accused "adequate legal assistance", [and] the criminal defendant's constitutional guarantee [is] of "a fair trial and a competent attorney."
>
> . . . .
> The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process. Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself.
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. . . While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.
>
> . . . .
>
> [B]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.

United States v. Cronic, 466 U.S. 648, 654–58 (1984) (internal citations omitted).

The two-part test established in Strickland was not modified in Cronic[8], thus, Petitioner's reference to "the Cronic standard" [ECF No. 1-1 at 17] is inapplicable. Instead, this court applies the two-pronged Strickland performance and prejudice standard to Petitioner's claims.

A. Petitioner's First Claim: Ineffective Assistance of Counsel at the Mercy Phase

In Strickland v. Washington, 466 U.S. 668 (1984),[9] the Supreme Court of the United States established a two-part test to determine whether counsel was constitutionally ineffective. Under the first prong, Petitioner must demonstrate that his counsel's performance was deficient and "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). But, "[j]udicial scrutiny of counsel's performance must be highly deferential" because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense assistance after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. In addition, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance. Id. at 689-90. There are no absolute rules for determining what performance

[8] The Fourth Circuit has recognized, "In *Cronic,* the Court reiterated the general *Strickland* rule and also provided that '[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " United States v. Ragin, 820 F.3d 609, 618 (4th Cir. 2016) (quoting Cronic, 466 U.S. at 658, 104 S.Ct. 2039).

[9] The West Virginia Supreme Court of Appeals explicitly adopted the Strickland test in Syllabus Point 5 of State v. Miller, 194 W.Va. 3, 6, 459 S.E.2d 114, 117, (1995), which held:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

is reasonable. See Hunt v. Nuth, 57 F.3d 1327, 1332 (4th Cir. 1995) (noting counsel's representation is viewed on the facts of a particular case and at the time of counsel's conduct).

Under the second prong, Petitioner must show that the deficient performance caused him prejudice. Strickland, 466 U.S. at 687. To demonstrate such prejudice, "the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 669. A reasonable probability is one that is "sufficient to undermine confidence in the outcome." Id. The Supreme Court has further held that to show prejudice, Petitioner must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (quoting Strickland, 466 U.S. at 687 (1984)). Consequently, if counsel's errors have no effect on the judgment, the conviction should not be reversed. Strickland, 466 U.S. at 691. The Fourth Circuit has recognized that, if a defendant "cannot demonstrate the requisite prejudice, [then] a reviewing court need not consider the performance prong" and vice versa. Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992).

A review of the record shows the state circuit court found that Petitioner met the first prong of the Strickland test necessary to merit habeas relief, because his counsel during the mercy phase was ineffective. However, the Lewis County Circuit Court found that Petitioner could not meet the second prong of the Strickland test, and therefore was not entitled to relief. ECF No. 9-11. The WVSCA affirmed that decision by memorandum decision, addressing the circuit court's "finding that neither Strickland prong was satisfied regarding the diminished capacity defense as well as any other asserted pretrial and guilt

phase issues." 2021 WL 2581725 at *3. As to Petitioner's other claims, the Supreme Court of Appeals wrote:

> Turning to petitioner's argument that his counsel was ineffective during the mercy phase of his trial, we likewise fail to find that the circuit court erred in denying his writ of habeas corpus. As to this issue, petitioner argued that his counsel were ineffective because they did not call any witnesses and they failed to make a meaningful plea for mercy on his behalf. Due to the overwhelming strength of the evidence presented against petitioner during the guilt phase, it is not reasonably probable that the result would have been different if counsel had called witnesses during the mercy phase. Moreover, consistent with the circuit court's order, although petitioner's counsel did not make a plea for mercy, the lack of this argument likewise would not have changed the jury's recommendation of no mercy due to evidence presented at trial as to the circumstances surrounding the murder. Thus, this assignment of error is without merit.

Id. at *5.

In the instant § 2254 proceeding, Petitioner alleges that he received ineffective assistance of counsel during the mercy phase in four ways.

1. Claim A.1.: Counsel did not Adequately Prepare Petitioner to Testify in his Own Defense in the Mercy Phase

Applying the two-prong Strickland standard to his trial counsel's actions, it is clear that Petitioner cannot meet both prongs of the test as to this ground. Assuming *arguendo*, consistent with the State court's determination, that Petitioner meets the first prong of Strickland, because his counsel's actions fell below an objective standard of reasonableness, Petitioner still cannot meet the second prejudice prong of Strickland.

To do so, Petitioner must demonstrate that there was a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Regardless of whether Petitioner was adequately prepared by his counsel

to testify in the mercy phase, there is little to no reasonable probability that the results would have been different if counsel had more thoroughly prepared Petitioner to testify.

Prior to the mercy phase, the jury heard that on December 20, 2008, Petitioner was angry at his fiancé, Vickie Page, and that the two were arguing in their bedroom before he shot her. During the argument, Petitioner went to the living room to get a gun to "scare" Page, because he believed she was cheating with another man, Brian "Barney" Joseph, who had been staying with the couple. Within minutes of returning to their bedroom with the gun, Petitioner shot Page in the head at point blank range, killing her instantly. The jury had also already heard testimony from Joseph, and from Petitioner's cousin and neighbor, Jason DeWayne Dehainant, who testified that after Petitioner shot Page, he came to Dehainant's home, with blood on his shoes and hands, and announced that he had "shot Vickie". ECF No. 9-15 at 115 – 116; 132; 134 – 135; 137 – 138; 142. Dehainant further testified that Petitioner was holding a bloody beer can when he arrived that day. Id. at 134 – 135, 142. Both men testified that Petitioner was not crying at the time he came to Dehainant's house. Dehainant further testified that Petitioner arrived five to ten minutes after Joseph arrived, and that Joseph was scared when he arrived at Dehainant's house. Id. at 140.

Further, the jury head the statement given by Petitioner to Trooper Morgan on the night of Page's killing. Id. at 194 – 215. Therein, Petitioner stated that: he "wished that hadn't happened" [Id. at 200]; "I love her so much, man, I mean, I was stupid over her. I mean, I know, they say love kills, it does." [Id. at 201]; "we got to arguing and fighting and I went in there and I got my damn pistol . . . just to scare her. You know, I mean, I was just going to – figure, you know, maybe we can just work everything out and –" [Id. at 202

– 203]; they "argued two or three minutes there before the gun went off" [Id. at 204]; when "I went back in there and I just – man, I mean, I just went to scare her and the mother f[ ]er went off and I picked her up, that's how I got that blood on me. I picked her up and held her and was crying and shaking" [Id. at 203]; he knew his gun was loaded because he had the gun during bear season and usually kept some rounds in it [Id. at 204 – 205]; but that he didn't check to see if the gun was loaded [Id. at 205]; she "was my wife, I was getting ready to get married to her" [Id.]; Page "kept arguing and I said 'well, I don't want to hear it.' We, you know, kept arguing. And I just pointed it at her, you know, and didn't think it was going to go off and I accidentally pulled the trigger, cause it's a double action and when it went off, it went 'boom' and that's when I flipped, man, I just . . . I blacked out after that" [Id. at 206]; "actually, I didn't really point it, I mean, I just went like – you know, just turned it. I mean, man, I love her. I love her with all my heart. There will never be another one." [Id. at 207]; "I told her I loved her and don't leave me. And she never did answer me back." [Id.]; then "I told [my parents] me and Vickie was fighting and the gun went off." [Id. at 208].

These were essentially the same points raised by counsel in questioning the Petitioner in the mercy phase. Moreover, the statements given by Petitioner on the night of the killing showed that: he believed Page was cheating with another man; he intended to brandish a firearm at Page in order to frighten her; he intended to "win" the argument through a show of force by brandishing the gun; he usually kept his firearms loaded; he realized he pointed the gun at Page; and he acknowledged that he pulled the trigger, although he claimed that he pulled the trigger accidentally. The totality of the facts presented to the jury, including Petitioner's own inculpatory statements to law

enforcement, were unlikely to be forgotten or overridden by Petitioner's later requests for leniency. It is unlikely with such damning testimony that more compelling testimony from the Petitioner in the mercy phase would have changed the outcoming of the mercy phase.

Accordingly, Petitioner cannot meet the second prong of Strickland because he cannot demonstrate that absent counsel's alleged unprofessional errors, that the result of the proceeding would have been different. It appears that Petitioner was angry at his fiancé. He left the room where they argued to retrieve a firearm in order to brandish it at her because he believed her to be unfaithful. And he knowingly pointed the gun at her. Critically, Petitioner did not allege that the gun accidentally discharged, but rather that he accidentally pulled the trigger. A jury could reasonably have found that these actions constituted a plan formed in a moment, which was carried out in the next moment, resulting in the type of malice aforethought which does not merit mercy in sentencing. It is not reasonably likely that further preparation of the Petitioner to testify in his own behalf at the mercy phase would have changed the result, based on the evidence already presented in the guilt phase. Because Petitioner cannot meet both prongs of Strickland on this ground, he is not entitled to habeas relief.

Further, as to Petitioner's claim that the State court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law, or decided a case differently than this Court has on a set of materially indistinguishable facts, his claim under § 2254(d)(1) fails. Petitioner contends that the holdings of Strickland and Cronic merit relief. However, Petitioner fails to explain how the State courts arrived at a conclusion opposite of the holdings of either of those two cases. A review of Petitioner's brief shows that the argument asserted as to the "contrary to" or "unreasonable

application" of federal law as determined by the United States Supreme Court is based on the holding of Wiggins. ECF No. 1-1 at 20 – 22. However, Wiggins concerns counsel's investigation of mitigating factors to present in the sentencing phase, not preparation of a defendant to testify in the sentencing phase. Accordingly, Petitioner fails to explain how his testimony at the mercy phase was so deficient as to demonstrate ineffective assistance in preparing him to testify in the mercy phase. Petitioner broadly claims that the State courts arrived at a conclusion opposite to that reached by the United States Supreme Court, but relies on no applicable precedent, thus this claim is without merit.

In Williams, 529 U.S. 362, 364 – 65 (2000), the Supreme Court held that a federal court may grant a habeas writ under the "unreasonable application" clause, "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Further, the Supreme Court stated in Williams that, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Id. at 365. Again, Petitioner fails to explain how the State courts made an unreasonable determination of the facts in light of the evidence presented in the State court as to this ground. Petitioner argues that trial counsel spent only sixteen minutes between the guilt and mercy phases of trial to prepare him to testify. ECF No. 1-1 at 19. However, as discussed in Section IV.A.2. below, in the omnibus hearing, Petitioner's counsel testified that counsel anticipated that there could have been a first degree murder verdict, and that Petitioner would have to be prepared to deal with that. ECF No. 9-10 at 33:19 – 21. Petitioner fails to demonstrate that the State court's holding was contrary to federal law as decided by the Supreme Court or was an

unreasonable application of the facts to the law on the issue of ineffective assistance of counsel. Accordingly, his claim on this ground lacks merit and should be dismissed.

2. Counsel did not Adequately Assess Potential Character Witnesses to Testify in the Mercy Phase

Petitioner argues that his counsel was ineffective by failing to offer in mitigation either the testimony of up to ten character witnesses, or certificates of rehabilitation work he completed during his pre-trial detention. ECF No. 1-1 at 19. Respondent counters that Petitioner's counsel's decision not to call character witnesses was made as part of a trial strategy, including limiting witnesses who could "open the door" to testimony about other unrelated prior bad acts of the Respondent, such as his prior threats of violence[10] to other women. ECF No. 10 at 19 – 24. Further, citing to both West Virginia and federal case law, Respondent contends that, "when character witnesses are family members or friends, their credibility is more likely to be questioned given their relationship with the defendant." Id. at 20, quoting State ex rel. Kitchen v. Painter, 226 W.Va. 278, 289, 700 S.E.2d 489, 500 (W. Va. 2010).

As to his counsel's decision not to call family and friends as character witnesses in the mercy phase, when viewed under the two-pronged Strickland standard, Petitioner cannot meet the second prong, which requires him to demonstrate that but for counsel's decision, the result of the mercy phase would reasonably have changed. In light of the evidence presented during the guilt phase[11], it is unlikely that any testimony by family and

[10] At the state habeas omnibus hearing, one of Petitioner's trial lawyers testified, "I recall speaking to—witnesses on that, and—off the top of my head, the—the one thing that stands out in my mind was some girl had indicated that [Petitioner] had threatened to cut her throat with a hoof knife and let her bleed out in the driveway, or something to that effect." ECF No. 9-10 at 54:15 – 19. See also Id. at 55:2 – 13.

[11] As discussed above, that Petitioner was enraged at his fiancé, that he purposefully went to get a gun to frighten her, then within minutes of retrieving the loaded weapon from another room, he returned and proceeded to fatally shoot her at point blank range.

friends would reasonably establish that Petitioner was a peaceful person, and that his conduct on the night he killed Vickie Page merited a finding of mercy.

Further, at the omnibus habeas corpus hearing in Lewis County Circuit Court, Petitioner's trial counsel Steven B Nanners testified:

> Q: Tell us when you worked with Mr. McCartney in preparation for his testimony at the bifurcation state.
> A: We worked with Mr. McCartney [ ] prior to trial. I don't have a date specific. I don't have – details on that. All I know is that we went over these matters with Mr. McCartney. We explained to him that – ***with respect to our agreement with [the prosecutor], that he would be permitted to get on the stand and show his remorse for – his actions. And that [the prosecutor] would not present [ ] 404(b)***[12] ***character evidence.***
> Q: Well, that conversation with [the prosecutor] took place between the guilty phase and the mercy phase; correct?
> A: Again, like I said earlier – it happened during the trial. Whether it was between the two, I don't know. I just know that –
> Q: Well, if he had been found guilty of second degree murder or . . . voluntary manslaughter, you wouldn't have had a mercy phase; correct:
> A: Correct.
> Q: Okay. So, the decision whether or not to put him on the stand could, therefore, not have occurred until he was found guilty of first degree murder:
> A: That's not true. Because you anticipate there could be a verdict of murder one (1), and that he would have to be prepared to deal with that.

ECF No. 9-10 at 32:21 – 33:21 (emphasis added). This testimony shows that counsel was concerned with the nature of the testimony he wanted to exclude from the jury, rather than the characterization of that testimony under the Rules of Evidence. Further, the West

[12] Although counsel referred to prior bad acts testimony as "404(b)" evidence, under West Virginia Rule of Evidence 404(b), such reference would be more appropriate in a discussion of prior bad acts testimony presented during the guilt phase, and not at the penalty phase.

Virginia Supreme Court of Appeals has held in Syllabus Point 7 of State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289 (2010):

> The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

The Supreme Court of Appeals further explained in State v. Trail, 236 W. Va. 167, 180–81, 778 S.E.2d 616, 629–30 (2015):

> Indeed, the issue during the mercy phase of a bifurcated trial is whether or not the defendant, who already has been found guilty of murder in the first degree, should be afforded mercy, *i.e.,* afforded the opportunity to be considered for parole after serving no less than fifteen years of his or her life sentence.

Moreover, McLaughlin recognized its prior precent in State ex rel. Dunlap v. McBride, 225 W.Va. 192, 691 S.E.2d 183 (2010), which addressed a similar issue to that presented here. In Dunlap "the defendant argued that the State improperly was allowed to introduce evidence of other bad acts including numerous incidents of violent conduct by the defendant toward his former wife and their children during the penalty phase without the trial court conducting a *McGinnis* hearing." State v. McLaughlin, 226 W. Va. 229, 240, 700 S.E.2d 289, 300 (2010). However, the Dunlap court found no error, stating:

> Mr. Dunlap has failed to cite to any decision of this Court where we have required a *McGinnis* hearing for sentencing purposes only. As a general matter, the rules of evidence, including Evid. R. 404(b) regarding 'other acts,' do not strictly

> apply at sentencing hearings. It has been held that Rule 404(b) does not apply to the penalty or punishment phase of a bifurcated trial. Moreover, a trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed. And a sentencing court is not restricted by the federal constitution to the information received in open court." Therefore, we find this issue to be without merit.

Id. (cleaned up). Accordingly, the prior bad acts evidence of Petitioner threatening to cut the throat of an old girlfriend could have been presented by the State in the mercy phase, without prior notice under § 404(b), and without a McGinnis hearing on the admissibility of that evidence. Counsel's agreement not to present family and friends as character evidence, which likely would not have been terribly persuasive, was intended to prevent the introduction of testimony by the State which would have been decidedly worse. Evidence that a convicted murderer had previously threatened to kill another woman would almost certainly have resulted in a finding of no mercy for the Petitioner. Excluding that evidence offered an opportunity for Petitioner to express his remorse and regret in the mercy phase, without further damaging him before the jury. This strategic decision by counsel falls well "within the range of competence demanded of attorneys in criminal cases," as mandated by Cronic. Further, reviewing counsel's performance under the highly deferential standard established in Strickland, this Court does not find that counsel's acts or omissions were unreasonable. Finally, Petitioner cannot demonstrate, as held in Lockhart, that "counsel's errors were so serious as to deprive [him] of a fair trial". Accordingly, Petitioner cannot meet the second prejudice prong of Strickland, and is not entitled to habeas relief on this ground.

As to Petitioner's claim that the State court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decided a case

differently than this Court has on a set of materially indistinguishable facts, his claim fails. As discussed above, Petitioner cannot meet the standards discussed in Strickland, Cronic, or Lockhart as to this claim. Although a federal court may grant a habeas writ under the "unreasonable application" clause, "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case," Williams, 529 U.S. at 364 – 65, Petitioner has failed to demonstrate that such circumstances are present. Accordingly, because there was not an unreasonable application of federal law as relates to this claim, Petitioner is not entitled to habeas relief on the claim.

3. Counsel did not Prepare or Make an Argument for Mercy

As to Petitioner's claim regarding his counsel's failure to make an argument for mercy in the mercy phase, he is unable to meet the two-prong Strickland test to demonstrate that his counsel was ineffective on that ground. Respondent contends that trial counsel argued extensively for leniency in the closing argument of the guilt phase, citing to the transcript of the closing argument. ECF No. 10 at 16.

In Strickland, the Supreme Court held that judicial scrutiny of counsel's performance must be highly deferential:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional

> assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689 (1984) (internal citations omitted). This Court is not here to second-guess counsel's tactics at trial including in the mercy phase.

Counsel made tactical decisions to argue some issues in the guilt phase, to the exclusion of other issues, and to not make further argument in the mercy phase. Those decisions are strongly presumed to have been made in the exercise of reasonable professional judgment, and accordingly, counsel's performance in this regard did not fall below an objective standard of reasonableness.

Counsel argued that while the jury considered the charged offense of murder, it should also consider convicting Petitioner of three lesser included offenses: (1) second degree murder which lacks the elements of premeditation, and deliberation; (2) voluntary manslaughter which lacks the elements of malice, premeditation, and deliberation; and (3) involuntary manslaughter based on Petitioner's unintentional acts made with reckless disregard for the safety of others. ECF No. 9-16 at 175. Further, counsel argued that acquittal was a fifth choice. Id. at 175 – 76. Counsel argued that the jury should consider Petitioner's mental state of intoxication and that he was "out of his mind drunk", which prevented Petitioner from forming the requisite intent to commit premeditated murder. Id. at 177 – 78. Based on the level of Petitioner's intoxication, counsel argued that Petitioner could not be convicted of any lesser included offense save involuntary manslaughter. Id. at 178.

Counsel further argued that a killing in the heat of passion, when a person flies into an uncontrollable rage is voluntary manslaughter, and that if the jury believed that

Petitioner was provoked into such a rage, that the jury should return a more lenient verdict. Id. at 178 – 80. Further, counsel argued that Petitioner's remorse was severe and immediate, that he was "agonized over this", and that his actions were a "stupid" accident, and that Petitioner did not know if his gun was loaded or not. Id. at 185, 188 - 189.

Again, this Court will assume that the State court properly found that counsel was ineffective in not presenting argument in the mercy phase. Nonetheless, the Court finds that Petitioner cannot meet the second prong of Strickland, because he cannot show that the result of the proceeding would have been different but for his counsel's alleged errors.

Rather, there was no reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Petitioner's own statements to law enforcement which were introduced into evidence showed Petitioner was a man who was heavily intoxicated, convinced his fiancé was having an affair, retrieved a firearm to threaten his fiancé in order to win an argument, and within two or three minutes of getting the firearm, fatally shot her in the head. Critically, Petitioner's own statement was that he *accidentally pulled* the trigger and shot Vickie Page. Petitioner also claimed that the gun *discharged accidentally*. However, considering the other circumstantial and uncontroverted evidence of Petitioner's rage, intoxication, and intent to get a firearm to frighten the victim, it is not likely that an argument by counsel on the issue of mercy would have changed the outcome of the mercy proceeding. Because there is no reasonable probability that absent counsel's alleged ineffective assistance that the outcome would have been different, petitioner cannot meet the second prong of Strickland and does not merit relief on this ground.

As to Petitioner's claim that the State court arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decided a case differently than this Court has on a set of materially indistinguishable facts, his claim fails. Petitioner claims that the decision of the WVSCA is contrary to or unreasonably applies the holdings of Wiggins v. Smith, 539 U.S. 510 (2003), "in which the United States Supreme Court overturned the Fourth Circuit's denial of federal habeas relief when trial counsel had failed to sufficiently investigation mitigation factors that had a reasonable probability of changing the outcome at the penalty phase." ECF No. 1-1 at 20. Wiggins was a § 2254 proceeding where the Supreme Court overturned the defendant's death penalty sentence where the counsel told the jury that they would hear evidence of the defendant's difficult life, but then failed to present any evidence of defendant's life history or family background which included an alcoholic parent, and repeated physical and sexual abuse in his home, in more than one foster homes, and in other placements. 539 U.S. at 515 – 517. The Supreme Court found that the record supported a finding that:

> [Counsel's] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, [ ] and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.

539 U.S. at 526. By contrast, here, counsel had developed a mitigation case, which included character witness statements, as discussed in Section IV.A.1. above. The facts

in Wiggins are distinguishable, and the State court did not make finding that was contrary to or an unreasonable application of that Supreme Court case. Accordingly, because there was not an unreasonable application of federal law as relates to this claim, Petitioner is not entitled to habeas relief on the claim.

Moreover, because counsel determined that it was strategically advantageous to ensure that damaging State evidence was not presented in the mercy phase, counsel elected not to present evidence other Petitioner's own testimony, or argue at the mercy phase. In retrospect, this decision may be questioned, but it is not the purpose of this Court to engage in 20/20 hindsight to second-guess trial strategies. See Strickland, 466 U.S. 668, 680 (1984). The fact that Petitioner believes that trial counsel should have made certain arguments or introduced certain evidence does not mean that trial counsel was required to do so. An unsuccessful defense counsel is not necessarily an ineffective one. See Id. at, 690. For all these reasons, Petitioner is unable to meet the second prong of Strickland and is not entitled to relief on this ground. Because Petitioner has also failed to show that any state court adjudication resulted in a decision that was based on an unreasonable determination of the facts, Petitioner has failed to satisfy § 2254(d)(2). As Petitioner has failed to satisfy either §§ 2254(d)(1) or (d)(2), and this claim is without merit under § 2254, and must be denied.

4. Counsel did not Establish a Diminished Capacity Defense in the Guilt Phase, Which Also Could have been Argued in the Mercy Phase.

Petitioner argues that his counsel did not establish a diminished capacity defense which could have been argued in the guilt and mercy phases. The WVSCA in its order denying habeas relief noted that, "the circuit court entered an order denying petitioner's

requested relief, finding that neither Strickland prong was satisfied regarding the diminished capacity defense as well as any other asserted pretrial and guilt-phase issues." McCartney v. Ames, No. 20-0242, 2021 WL 2581725 at * 2 (W.Va. June 23, 2021). Further, the WVSCA ruled that:

> At the omnibus hearing, trial counsel testified that the decision not to utilize an expert to address his intoxication was a strategic/tactical decision to protect petitioner. Turning to the second prong of the *Miller* test, we agree with the circuit court's determination that "based upon the totality of the evidence presented at trial, ... it is not reasonably probable that expert testimony regarding petitioner's level of intoxication would have changed the results of the jury verdict."

Id. at *5.

Further, as discussed more fully in Section IV.B. below, trial counsel did obtain a jury instruction regarding diminished capacity. Counsel argued in the guilt phase that because of his intoxication, Petitioner had a diminished capacity such that he lacked the ability to form the requisite intent to commit murder. In West Virginia, "[A] defendant who raises a diminished capacity defense ... challenges his capacity to premeditate and deliberate *at the time of the criminal act.*" State v. Joseph, 214 W. Va. 525, 533, 590 S.E.2d 718, 726 (2003) (quoting Commonwealth v. Brown, 396 Pa.Super. at 181–82, 578 A.2d at 466 (emphasis added)). Although counsel did not argue this point in the mercy phase, the argument was presented to the jury in the guilt phase, and found it unpersuasive. Accordingly, it is unlikely that the jury would have found a second presentation of the same argument persuasive in the mercy phase, such that presentation of the argument would have changed the outcome.

As in Sections IV.A.1. through 3. above, this Court assumes for purposes of argument and consistent with the findings of the State courts, that counsel was ineffective in the mercy phase, thereby satisfying the first prong of the Strickland test. However, Petitioner has failed to demonstrate a reasonable probability of a different outcome in the mercy phase, and therefore cannot meet the second prong of Strickland. As discussed in Section IV.A.1. above, the facts related to Petitioner's decisions on the night he killed Ms. Page were damaging. Those facts as repeated extensively herein are as follows: (1) that while arguing with his fiancé about her alleged unfaithfulness, Petitioner retrieved a weapon from another room; (2) failed to check the weapon to determine if it was loaded, despite a habit of keeping his firearms loaded; (3) pointed the gun at his fiancé's head in an effort to frighten her such that Petitioner could "win" the argument; and (4) he "accidentally" pulled the trigger. In addition to those damaging facts, the jury was also presented with evidence concerning Petitioner's level of intoxication, including that he had drunk as much as a twelve-pack of beer throughout the day. Although Petitioner's counsel successfully obtained a jury instruction regarding diminished capacity, and argued that because of his intoxication Petitioner had diminished capacity on the night he killed Vickie Page, the jury did not find that argument persuasive. In light of the substantial facts presented through State witnesses and Petitioner's own statements, it was not reasonably likely that the jury would have reached another conclusion in its decision on mercy. Therefore, Petitioner fails to demonstrate any prejudice resulted from any ineffective assistance of his counsel. Accordingly, Petitioner fails to meet the second prong of the Strickland test and is not entitled to habeas relief.

As to Petitioner's contention that he is entitled to relief under § 2254(d)(1) because the State court misapplied Strickland, the undersigned disagrees. The State court found that Petitioner did not receive ineffective assistance of counsel under the State v. Miller standard, which is a State-court adoption of Strickland.

Further, Petitioner has failed to show that any State court adjudication resulted in a decision that was based on an unreasonable determination of the facts, Petitioner has failed to satisfy § 2254(d)(2). As Petitioner has failed to satisfy either §§ 2254(d)(1) or (d)(2), and this claim is without merit under § 2254, and must be denied.

B. Petitioner's Second Claim: Forensic Evaluation for Diminished Capacity Defense

Petitioner alleges that his trial counsel was ineffective for not obtaining an expert witness to testify regarding his intoxication, and that severe intoxication could have prevented Petitioner from forming the requisite intent necessary to commit first degree murder. ECF No. 1-1 at 25. As with Petitioner's first claim, his second claim was adjudicated on the merits in state court proceedings, thus, to succeed in this § 2254 petition, Petitioner must satisfy the requirements of either §§ 2254(d)(1) or (d)(2).

Petitioner contends that the State courts "unreasonably applied *Strickland* regarding the Petitioner's complaints of the failure to obtain expert witnesses – especially a diminished capacity expert." ECF No. 1-1 at 25. However, despite lengthy argument as to Petitioner's wish that his counsel had pursued expert testimony, and how such expert testimony might have benefitted his defense, Petitioner fails to explain how the State court unreasonably applied Strickland as to his claims regarding a diminished capacity expert. Id. at 25 – 35.

Regardless of whether Petitioner's counsel obtained expert testimony on the topic of diminished capacity, counsel obtained a jury instruction on the issue of voluntary intoxication and argued for leniency based on that instruction. The trial court instructed the jury that:

> [A]lthough intoxication will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the specific intent to kill, form malice, or act with premeditation or deliberation. So, evidence that a Defendant acted while in a state of intoxication is to be considered in determining whether or not the Defendant acted with specific intent to kill maliciously or premeditatedly and deliberately. If the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of an intoxication, the mind of the accused was incapable of performing the specific intent to kill, or was incapable of acting maliciously or was incapable of acting with premedication or deliberation, the jury should acquit the Defendant of Murder in the First Degree.
>
> Further, if the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of intoxication, the mind of the accused was incapable of performing or did form this specific intent to kill, or was incapable of acting maliciously, the jury should acquit the Defendant of Murder in the Second Degree.

ECF No. 9-16 at 162 – 63. During closing argument in the guilt phase, trial counsel argued that:

> Their own evidence dictates that you should acquit Arnold McCartney. The very evidence that they bring in here and tell you now, "we want you to convict him of First Degree Murder", is the very evidence that shows that you should not convict him of First Degree Murder.
>
> I want to talk to you about what we know about Arnold McCartney on this morning that this happened. Arnold McCartney was intoxicated, he was drunk. He had been drinking beer all day. The State's own witnesses have said that. Barney was talking about it, 'yeah he was drinking all this

beer'. Intoxication was clearly proved by the evidence in this case.

You'll recall Brian Joseph, he started drinking beer early, when Vickie left. It was about 9:30 or 10:00 when he woke up and Arnold was already drinking. I even think he said, "He was drinking tow, three, four beers to my one." Kept drinking all day. Eventually, he passed out about 3:00, 3:30, he was in the bed. And then Vickie came home about 4:00 o'clock or so and woke him up. He started drinking again. He had been drinking all day. Even Trooper Morgan, the Trooper that charged him with First Degree Murder, even he acknowledges he was drunk. You cannot drink that much alcohol all day without being intoxicated.

With that intoxication, I think we've got to look to whether or not the State can establish its burden of proof beyond a reasonable doubt as instructed, as to whether he acted intentionally, whether he was able to form in him mind the intent to kill, whether he was able to form a malicious intent, or whether he was able to deliberate in a cool state of mind. All of those are necessary. And when the State presents its evidence and says, "Yeah, he was drunk," they are disproving their own case. He should never have been charged with First Degree Murder in the first place, never should have. When that Trooper walks up there and sees a guy just out of his mind drunk, and, you know, "I didn't mean to do it," that's not First Degree Murder. He just charged him with the first thing he thought of, that's what happened. He's a young Trooper and this was a big case, but he knows it doesn't add up to that and the State does, too.
Barney also testified as you recall, that Arnie was getting more and more drunk all day, and he fell down, fell down in the living room.

And you recall Arnie's statement, the night in question, when Trooper Morgan first arrived on scene with the others, after the 911 call. Here is Arnold McCartney, just—still at the scene, still right there and this is what he says, "Officer: How much have you had to drink today? Defendant: Oh, I don't' know, probably a 12-pack." So he already knows he's had a 12-pack of beer, at least. . . [T]he testimony of Trooper Morgan, acknowledging that he was drunk. And when you apply this to the charge, you've go to assess whether or not the State can prove that Arnold McCartney formed that intent to kill, or was he merely acting drunk, okay? Was he acting maliciously or

> was arising out of his intoxication? Was he acting premeditatedly and deliberately or was this out of intoxication? If you have a reasonable doubt as to any of those, because he was so intoxicated, you must acquit him. You must acquit him of First Degree Murder, you must acquit him of Second Degree Murder. . . . He doesn't have to have intent on the Involuntary Manslaughter. . . And if you believe because of believe because of that intoxication he was unable to form that intent to kill, then you must acquit.

ECF No. 9-16 at 176 – 178. Counsel successfully obtained an instruction on, and argued the defense of involuntary intoxication at trial. As noted by the Fourth Circuit:

> Criminal defendants in this country are entitled to a fair, but not a perfect trial. "[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," and the Constitution does not demand one.

Sherman v. Smith, 89 F.3d 1134, 1137 (4th Cir. 1996) (quoting United States v. Hasting, 461 U.S. 499, 508, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983)). Further, in Petitioner's own State habeas proceeding the WVSCA wrote:

> The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

2021 WL 2581725 at * 4 (citing State v. Miller, 194 W.Va. 3, 16, 459 S.E.2d 114, 127 (1995).[13]

[13] As discussed in Footnote 9, herein, in State v. Miller the West Virginia Supreme Court of Appeals explicitly adopted the Strickland test for determining whether a petitioner received ineffective assistance of counsel.

Because Petitioner fails to demonstrate that any State court adjudication resulted in a decision contrary to clearly established federal law or that the state court misapplied clearly established federal law, Petitioner fails to satisfy § 2254(d)(1). Further, because Petitioner has also failed to show that any state court adjudication resulted in a decision that was based on an unreasonable determination of the facts, Petitioner has failed to satisfy § 2254(d)(2). As Petitioner has failed to satisfy either §§ 2254(d)(1) or (d)(2), his second claim is without merit under § 2254, and must be denied.

C. Petitioner's Third Claim: Ballistics Expert

As described by the WVSCA in McCartney II, "Petitioner shot his fiancée in the head at point-blank range with a revolver, and she died instantly." McCartney v. Ames, 2021 WL 2581725, at *1. The State presented evidence from a firearms examiner, Phillip Kent Cochran, who testified that the firearm functioned properly:

> The Wesson Firearm revolver chambered in .41 magnum, State's Exhibit #11, was test-fired an examined for mechanical function and safety. No problems were encountered during the examination and test-firing of this revolver. The single action trigger was found to hold three and three quarter pounds of pressure and fired with four pounds of pressure. The double action trigger was found to hold 11-1/4 pounds of pressure and fired with 11-1/2 pounds of pressure. The internal transfer bar functioned as desired and the cocked hammer did not push off or bump off during examination. Based on these examinations, in my opinion, the Wesson Firearms revolver, State's Exhibit #11, functioned as designed.

ECF No. 9-16 at 101 – 102. Cross examination of Mr. Cochran focused on attempting to exclude his testimony based on chain of custody, including that "the witness testified that he did not sign his own case submission form." Id. at 104 – 105.

> Q: Mr. Cochran, your forensic laboratory case submission form, at the end, did you sign that?

> A: It has my initials, showing that that is part of the documentation that I examined, but I did not sign that submission form.
> Q: You didn't sign that you received via evidence locker, laboratory case number 804-894, section ID number F-08-201?
> A: All of that information is filled out by our Evidence Receiving Technicians.
> Q: You didn't sign it?
> A: No, I did not sign it.
> Q: They didn't sign it? Nobody signed it?
> A: I don't have a signature on it. . .

Id. at 104.

A Strickland review of the decision not to obtain a ballistics expert shows that Petitioner is not entitled to habeas corpus relief. First, Petitioner must demonstrate that his counsel's actions fell below an objective standard of reasonableness. The record shows that counsel had a strategy of attempting to discredit the State's witness. However, as noted by the WVSCA in Petitioner's habeas appeal:

> [T]he State presented evidence that petitioner shot the victim in the head at point-blank range with a gun that was shown to be in perfect working order. Based upon this evidence, we fail to see how petitioner could satisfy the second prong of the Miller test, as there is no reasonable probability that a firearms expert would have changed the result of the proceeding.

2021 WL 2581725 at * 5.

Second, Petitioner must demonstrate that there was a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Petitioner fails to show how his counsel's decision to not obtain forensic testing prejudiced him. Petitioner's own statement was that he "accidentally" pulled the trigger of the firearm. A state expert testified that the firearm was in proper working order. Even if a "dueling" defense expert testified that the firearm was not in proper working

order, Petitioner's own statement implicates that he pulled the trigger, not that the firearm discharged on its own. Accordingly, this claim fails to meet either the performance or prejudice prong of Strickland, and Petitioner's claim is without merit. Since the decision to not obtain or call an expert witness could reasonably be viewed as legitimate trial strategy, it does not constitute ineffective assistance unless counsel's decision was so patently unreasonable that no competent attorney would have made it.

Here again, Petitioner has failed to meet either the performance or prejudice prong of the Strickland test, and is not entitled to relief. Because Petitioner fails to demonstrate that any State court adjudication resulted in a decision contrary to clearly established federal law or that the state court misapplied clearly established federal law, Petitioner fails to satisfy § 2254(d)(1). Further, because Petitioner has also failed to show that any state court adjudication resulted in a decision that was based on an unreasonable determination of the facts, Petitioner has failed to satisfy § 2254(d)(2). As Petitioner has failed to satisfy either §§ 2254(d)(1) or (d)(2), his third claim is without merit under § 2254, and must be denied.

In sum, because Petitioner has not demonstrated that any of his three claims regarding the state court's adjudication of his case resulted in a decision contrary to clearly established federal law or that the state court misapplied clearly established federal law, Petitioner fails to satisfy § 2254(d)(1) as to any of his claims. Because Petitioner has also failed to show that any of his three claims regarding the state courts adjudication of his case resulted in a decision that was based on an unreasonable determination of the facts, Petitioner has failed to satisfy § 2254(d)(2) as to any of his

claims. As Petitioner fails to satisfy either §§ 2254(d)(1) or (d)(2), all three claims are without merit under § 2254, and must be denied.

V. RECOMMENDATION

For the reasons set forth in this Opinion, it is **recommended** that the petitioner's § 2254 petition be **DENIED** on the merits and **DISMISSED WITH PREJUDICE**. It is further **RECOMMENDED** that Respondent's motion to dismiss [ECF No. 9] be **GRANTED**.

The Petitioner shall have **fourteen (14) days** from the date of filing this Report and Recommendation within which to file with the Clerk of this Court, **specific written objections, identifying the portions of the Report and Recommendation to which objection is made, and the basis of such objection.** A copy of such objections should also be submitted to the Honorable Gina M. Groh, United States District Judge. Objections shall not exceed ten (10) typewritten pages or twenty (20) handwritten pages, including exhibits, unless accompanied by a motion for leave to exceed the page limitation, consistent with LR PL P 12.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. 28 U.S.C. §636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 104 S.Ct 2393 (1984).

This Report and Recommendation completes the referral from the district court. The Clerk is directed to terminate the Magistrate Judge's association with this case.

The Clerk of the Court is directed to provide a copy of this Report and Recommendation to all counsel by electronic means.

DATED: May 25, 2023

/s/ *Robert W. Trumble*
ROBERT W. TRUMBLE
UNITED STATES MAGISTRATE JUDGE

Arnold McCartney Petitioner Below, Petitioner
v.
Donnie Ames, Superintendent, Mount Olive Correctional Complex, Respondent Below, Respondent

No. 20-0242

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

June 23, 2021

(Lewis County 13-C-12)

MEMORANDUM DECISION

Petitioner Arnold McCartney, by counsel Jeremy B. Cooper and James E. Hawkins Jr., appeals the February 18, 2020, order of the Circuit Court of Lewis County, denying his amended petition for a writ of habeas corpus. Donnie Ames, Superintendent, Mount Olive Correctional Center, by counsel Benjamin F. Yancy, III, filed a response in support of the circuit court's order. Petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioner shot his fiancée in the head at point-blank range with a revolver, and she died instantly. He was indicted on charges of first-degree murder by the Lewis County Grand Jury. At trial, petitioner's counsel advanced the following theories: voluntary intoxication, heat of passion, and accident. Petitioner believed that his fiancée was cheating on him, and he intended to scare his fiancée with the gun, but accidentally pulled the trigger. Petitioner was found guilty of first-degree murder during the guilt phase of the jury trial. Following the guilt phase, the court conducted the mercy phase. After deliberating for approximately twelve minutes, the jury returned a verdict recommending that petitioner not be granted mercy. Thus, petitioner was sentenced to life in prison without the possibility of parole.

Petitioner's trial counsel raised seven assignments of error on his behalf in his direct appeal. This Court, not persuaded by petitioner's arguments, affirmed his conviction and sentence. *See*

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State v. McCartney, 228 W. Va. 315, 719 S.E.2d 785 (2011).[1] Two of the assignments of error in that proceeding are relevant to the issues presently before the Court. First, petitioner claimed that the circuit court denied him the opportunity to present closing arguments on the issue of mercy. This Court found that petitioner did not seek to present closing arguments during the mercy phase and had not been denied argument. Second, this Court considered petitioner's contention that he was entitled to a new trial on the basis of prosecutorial misconduct stemming from the State's closing argument that "letting a murderer go invites a repeat of the same crime." The Court found that given the isolated nature and the full context of the remark, as well as trial counsel's non-contemporaneous objection and the circuit court's consideration of the effect of a possible instruction, the circuit court did not abuse its discretion in its handling of the matter.

Petitioner then filed a pro se petition for a writ of post-conviction habeas corpus. After several years of delay, petitioner filed an amended petition, through counsel, arguing that trial counsel failed to conduct adequate and effective *voir dire* on the issue of mercy; failed to conduct adequate and effective cross-examination of witnesses concerning his level of intoxication and demeanor; failed to provide adequate representation during the mercy phase by not providing any mitigating testimony and by not

making any argument in favor of mercy; failed to propose an adequate instruction on the defense of accident; failed to seek any funds or expert witnesses to conduct an evaluation for competency, criminal responsibility, or diminished capacity; failed to obtain an expert on firearms, ballistics, or forensic pathology; and failed to obtain witnesses favorable to petitioner in both the guilt and mercy phases.

The State filed a response to the Amended Petition, denying petitioner's allegations; however, the State later sent correspondence to petitioner's habeas counsel providing that the "omission of an expert on the issue of premeditation was aberrant of the established standards of practice" but further noting that the State "disagree[d] that the trial presentation of an expert on [petitioner's] mental acuity would have affected the [guilty] verdict favorably for the defendant."[2] As a proposed resolution, the State noted "[i]n order to obviate a new trial with nine year old evidence, the State offers to request the Court to reconsider the life sentence and modify the same to 'with mercy.'" The parties presented this information to the circuit court on August 4, 2017; however, the circuit court declined to adopt the proposal and, instead, ordered that the matter proceed to an evidentiary hearing.

During a November 30, 2017, omnibus hearing petitioner offered the testimony of Dr. Bobby Miller and attorney Jerry Blair, an attorney offered as an expert in criminal defense. Dr. Miller testified that "[i]n my opinion, there is a reasonable probability that, but for counsel's failure to request a forensic psychiatric evaluation, the results of the proceedings would have been different[ ]" as a forensic psychiatric evaluation could address diminished capacity. Attorney Jerry Blair opined that had trial counsel obtained a diminished capacity evaluation, there was a

reasonable probability that the outcome of the proceedings would be different and he opined that trial counsel's professional conduct fell below an objective standard of reasonableness.

Petitioner and both of his trial counsel testified at a second evidentiary hearing which was held on January 25, 2019.[3] Petitioner testified about his trial counsel's limited preparation for the mercy phase, the availability of character witnesses, and other mitigating evidence. Trial counsel's testimony focused on their investigation, strategy, and other motivations and circumstances surrounding the preparation for and events of trial, including an agreement with the prosecutor not to put on any witnesses during the mercy phase other than petitioner, in exchange for the State withholding its own witnesses. Trial counsel also testified that the decision not to utilize an expert to address petitioner's intoxication during the guilt phase was a strategic/tactical decision to protect petitioner.

Following the submission of briefs by both petitioner and the State, the circuit court entered an order denying petitioner's requested relief, finding that neither *Strickland* prong was satisfied regarding the diminished capacity defense as well as any other asserted pretrial and guilt-phase issues. As to the mercy phase, the court found:

> . . . Trial Counsel's performance during the mercy phase of trial was wholly inadequate. Trial counsel failed to prepare Petitioner to testify at the mercy phase of trial, failed to prepare any witnesses to testify on petitioner's behalf, and failed to ask the jury for mercy for their client. Trial counsel claims the decision was made not to give an opening or closing statement based upon their agreement with the Prosecutor that petitioner would be the only testimony and evidence presented at the mercy phase of trial. This "agreement" was not memorialized in writing or put on the record, leaving the details a mystery. Even if

the failure to make an opening or closing statement was by some agreement, this court concludes that it is not a reasonable strategy to fail to request mercy on behalf of your client.

The second (2nd) prong of *Strickland* requires Petitioner to prove " . . . that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). While this seems an impossible standard for a reviewing court to find, without replacing its judgment for the judgment of the jury, in this case the Court is obliged nonetheless to make an analysis. While the Court in *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 655 S.E.2d 794 (2007), found *comments made by counsel* could prejudice a Defendant with regard to the mercy phase, the Court was silent on Counsel's *failure to comment*.

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In the present case there has been no evidence presented that counsel's failure to argue either in opening or closing of the mercy stage would significantly change the outcome of the mercy phase. This Court is unaware of any additional information that would have been adduced at trial in this matter, which could have been used as a verbalization of a request for mercy and that would have created a "reasonable probability" of a different outcome in this matter. None was made a part of the [petition for a] Writ of Habeas Corpus in this matter. Much was made of the Petitioner's progress while incarcerated since his conviction and subsequent incarceration, but this is not relevant to this Court's analysis on this issue.

In *State ex rel. Shelton*, the Court concluded "...defense counsel's closing argument contained no meaningful plea for mercy..." and found the (2nd) prong of Strickland "satisfied." *Id.* at 586, 802. However, the Court in *State ex rel. Shelton*, the Court looked at the totality of the circumstances above and beyond the lack of a mercy plea to conclude the second (2nd) prong of Strickland satisfied. Here the totality of the circumstances do not weight as heavily toward satisfying the second (2nd) prong of Strickland, therefore this Court **FINDS** the second (2nd) prong of Strickland is not satisfied.

Petitioner argued on appeal that he was not permitted the opportunity to give a closing argument, however, the West Virginia Supreme Court of Appeals found that counsel for the Petitioner could have made a closing argument, ***but chose not to.*** *State v. McCartney*, 228 W. Va. at 329, 719 S.E.2d 785 at 799 (2011). Therefore, this Court **FINDS** counsel's failure to address the jury and make a meaningful plea for mercy on Petitioner's behalf to not be grounds for *habeas* relief.

Petitioner appeals from this order.

"In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the

> final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

"On an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

Petitioner claims that he received ineffective assistance of counsel during both the guilt and mercy phases of his trial and that the circuit court erred when it failed to grant his amended habeas petition. Additionally, he claims that the circuit court committed cumulative error.

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As to his initial two assignments of error, the Sixth Amendment of the United States Constitution and Article III, § 14 of the West Virginia Constitution requires that a criminal defendant receive competent and effective assistance of counsel. *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 152, 469 S.E.2d 7, 11 (1996). However, we have said that

> the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another. This result is no accident, but instead flows from deliberate policy decisions this Court and the United States Supreme Court have made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential" and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance[.]" *Strickland* [*v. Washington*], 466 U.S. [668,] 689-90, 104 S.Ct. [2052,] 2065-66, 80 L.Ed.2d [674,] 694-95 [(1984)]. In other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a "wide range." The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

State v. Miller, 194 W. Va. 3, 16, 459 S.E.2d 114, 127 (1995).

> "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland* . . . : (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syllabus point 5, *State v. Miller*[.]

Syl. Pt. 3, *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

> In reviewing [*Strickland's* first prong,] counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

Miller, 194 W. Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. In reviewing the second or prejudice prong, the court looks at whether "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceedings would have been different." *Vernatter*, 207 W. Va. at 13, 528 S.E.2d at 209, Syl. Pt. 3, in part (quoting *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 5).

Upon our review of the record, the trial court did not err when it failed to grant petitioner habeas corpus relief regarding his ineffective assistance of counsel claim. First, as to his argument about counsel's performance during the guilt phase, petitioner claims that counsel was deficient where they failed to obtain an expert witnesses to address his intoxication and his ability to form intent and further failed to obtain a ballistics or firearm expert to establish that the gun accidentally discharged. At the omnibus hearing, trial counsel testified that the decision not to utilize an expert to address his intoxication was a strategic/tactical decision to protect petitioner. Turning to the second prong of the *Miller* test, we agree with the circuit court's determination that "based upon the totality of the evidence presented at trial, . . . it is not reasonably probable that expert testimony regarding petitioner's level of intoxication would have changed the results of the jury verdict." Further, petitioner's argument that his trial counsel were ineffective because they did not retain a ballistics/firearms expert at trial is unavailing. At trial, the State presented evidence that petitioner shot the victim in the head at point-blank range with a gun that was shown to be in perfect working order. Based upon this evidence, we fail to see how petitioner could satisfy the second prong of the *Miller* test, as there is no reasonable probability that a firearms expert would have changed the result of the pleadings.

Turning to petitioner's argument that his counsel was ineffective during the mercy phase of his trial, we likewise fail to find that the circuit court erred in denying his writ of habeas corpus. As to this issue, petitioner argued that his counsel were ineffective because they did not call any witnesses and they failed to make a meaningful plea for mercy on his behalf. Due to the overwhelming strength of the evidence presented against petitioner during the guilt phase, it is not reasonably probable that the result would have been different if counsel had called witnesses during the mercy phase. Moreover, consistent with the circuit court's order, although petitioner's counsel did not make a plea for mercy, the lack of this argument likewise would not have changed the jury's recommendation of no mercy due to evidence presented at trial as to the circumstances surrounding the murder. Thus, this assignment of error is without merit.

Finally, petitioner argues there was cumulative error in the proceedings below. Although a conviction may be set aside where the cumulative effect of numerous errors prevent a defendant from receiving a fair trial, this doctrine only evaluates the effect of matters determined to be error. *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992). Because we find that there was no error in this case, the cumulative error doctrine does not apply.

For the foregoing reasons, we affirm the circuit court's decision in its February 18, 2020, order denying the petition for habeas corpus relief.

Affirmed.

ISSUED: June 23, 2021

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CONCURRED IN BY:

Chief Justice Evan H. Jenkins
Justice Elizabeth D. Walker
Justice Tim Armstead

Justice John A. Hutchison and Justice William R. Wooton concur, but would set this case for Rule 19 argument.

Footnotes:

[1.] We thoroughly addressed the facts and circumstances surrounding this murder in the direct appeal. Following resolution of the direct appeal, petitioner filed a writ of certiorari to the United States Supreme Court which was denied.

[2.] This letter was sent by a special prosecutor for the State, although the State was represented by the then-Prosecuting Attorney at trial.

[3.] At this omnibus hearing, the Special Prosecutor objected to his letter being entered into the record and noted that he had moved off his position in the letter. The court allowed the letter to remain in the court file and gave it weight, but ultimately the court refused to "make it a part of the record[.]"

C' cc

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

State ex Rel. ARNOLD McCartney,
Petitioner,

v.

Case No. 13-C-12
Hon. Kurt W. Hall

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,
Respondent.

ORDER FROM WRIT OF *HABEAS CORPUS PROCEEDING*

This matter came before the Court for an Omnibus Hearing on the following dates: November 30, 2017 and January 25, 2019. The following parties were present: Arnold Wayne McCartney, Petitioner, by and through counsel, James E. Hawkins, Jr. and Jeremy B. Cooper; and Gerald Hough, Special Prosecuting Attorney. On or about the 12th day of October, 2016, Petitioner filed his "Amended Petition for Writ of *Habeas Corpus* ad Subjiciendum." On or about the 25th day of October, 2016, the State filed "Answer to Amended Petition for Writ of Habeas Corpus Ad Subjiciendum." On or about the 14th day of January, 2019, the State filed "Brief upon the Habeas Corpus Issue." On or about the 22nd day of January, 2019, Petitioner filed "Memorandum of Law on Petitioner's Ineffective Assistance of Counsel Claim." Additionally, on or about the 23rd day of January, 2019, Petitioner filed "Notice of Petitioner's Intent to Assert Losh Issue."

Thereupon, Petitioner's counsel and the Court advised the Petitioner that all issues which are waived on the *Losh v. McKenzie*, checklist cannot be henceforth raised in subsequent *habeas corpus* proceedings and at the conclusion of said admonishment, the Petitioner stated to the Court that he fully understood that all waived issues could not be hereafter raised in subsequent *habeas*

corpus proceedings, and that all issues that the Petitioner intends to raise are contained in his *Petition.* (166 W.Va. 762, 277 S.E.2d 606 (1981)).

Thereupon, the Court **FINDS** and **CONCLUDES** as a matter of law and fact that all issues not raised in the Petitioner's current *Petition for Writ of Habeas Corpus ad Subjiciendum* be and the same are expressly waived and may not be raised in any subsequent *habeas corpus* proceedings.

Thereupon, the Court inquired of the Petitioner if he desired to waive the Attorney-Client privilege between himself and trial counsel Steven B. Nanners and Dennis J. Willett, the attorneys that represented him in his underlying criminal case, and the Petitioner set forth his waiver of the aforesaid Attorney-Client privilege.

On or about the 30th day of November, 2017, the Court held the first (1st) Omnibus Hearing wherein the Petitioner presented the testimony of Bobby A. Miller, II and Gerald E. Blair, Jr. The Court held a second (2nd) Omnibus Hearing on the 25th day of January, 2019, wherein the Petitioner presented the testimony of Steven B. Nanners, Dennis J. Willett, and Petitioner.

Thereupon, the Court reviewed the evidence and heard the arguments of counsel after due and mature consideration, the Court permitted the parties to submit a final brief in this matter within thirty (30) days of the final Omnibus Hearing. On or about the 19th day of February, 2019, Respondent filed "Respondent's Final Habeas Brief." On or about the 26th day of February, 2019, Petitioner filed "Petitioner's Brief in Support of Post-Conviction Habeas Relief."

Procedural History

On or about the 18th day of February, 2010, the jury found Petitioner guilty of "Murder in the First (1st) Degree." On that same day, the Court proceeded to the second (2nd) phase of the

trial wherein the Jury did not recommend mercy. On or about the 4th day of May, 2010, the Court sentenced Petitioner to be confined to the Mount Olive Correctional Complex for the rest and remainder of his natural life.

Petitioner is currently serving a life sentence at Mount Olive Correctional Complex. Petitioner appealed his conviction to the West Virginia Supreme Court of Appeals. On or about the 17th day of November, 2011, The West Virginia Supreme Court of Appeals issued a *Per Curiam* Opinion affirming Petitioner's conviction.

Petitioner's Grounds for *Habeas Corpus* Relief

In Petitioner's "Amended Petition for Writ of *Habeas Corpus* ad Subjiciendum", he asserts the following grounds for relief: ineffective assistance of counsel both during the guilt phase and mercy phase of the bifurcated trial. Specifically, Petitioner outlines the following areas where trial counsel was ineffective:

(1.) Petitioner's trial counsel failed to conduct adequate and effective jury *voir dire* on the issue of mercy. Trial Counsel failed to effectively question jurors about their views regarding life imprisonment, with or without possibility of parole, to discover whether they will be able to fairly and impartially follow the law in deciding what sentence to impose.

(2.) Petitioner's trial counsel failed to conduct adequate and effective cross-examination of witnesses. Trial counsel failed to impeach State witnesses with prior statements regarding Petitioner's demeanor and his level of intoxication during the commission of the offense.

(3.) Petitioner's trial counsel failed to conduct adequate and effective representation during the mercy phase of Petitioner's bifurcated trial. Trial Counsel failed to make any argument whatsoever and failed to introduce evidence mitigating testimony or evidence on Petitioner's behalf.

(4.) Petitioner's trial counsel failed to conduct adequate and effective representation during drafting and proposing jury instructions for Petitioner's trial with regard to his defense that the shooting was accidental.

(5.) Trial counsel failed to consult with or seek approval for funds to retain an expert witness to conduct a competency, criminal responsibility and diminished capacity evaluation of Petitioner. Trial Counsel never consulted with an expert on these issues despite the fact that Petitioner has significantly lower intellectual functioning and was also severely intoxicated during the commission of the offense.

(6.) Trial Counsel failed to consult with or seek approval of funds to retain expert witnesses to conduct an independent examination regarding firearms, ballistics or forensic pathology. Despite Petitioner's assertion at trial that the firearm was discharged accidently, trial counsel failed to consult with or retain experts to support his defense of an accidental shooting.

(7.) Trial counsel failed to adequately and effectively investigate Petitioner's case to secure the attendance of witnesses favorable to the Petitioner during the case-in-chief and during the mercy phase. Petitioner disclosed potential witnesses to trial counsel who would have testified to Petitioner's good character during the case-in-chief and during the mercy phase of the trial. Petitioner also completed numerous courses while incarcerated prior to trial and received Certificates of Completion in a variety of courses and topics. (*Amended Petition for Writ of Habeas Corpus Ad Subjiciendum*, ¶1-7).

On or about the 30th day of November, 2017, Petitioner's first (1st) Omnibus Hearing, Petitioner asserted the following grounds for relief pursuant to *Losh v. McKenzie*: (1) mental competency at time of crime (*Losh* List No. 7), (2) denial of counsel (*Losh* List No. 11), (3) unfulfilled plea bargains (*Losh* List No. 19), (4) ineffective assistance of counsel (*Losh* List No. 21), (5) refusal to subpoena witnesses (*Losh* List No. 34), (6) claim of incompetence at time of offense as opposed to time of trial (*Losh* List No. 39), (7) instructions to the jury (*Losh* List No.42), and (8) sufficiency of evidence (*Losh* List No. 45).

On or about the 23rd day of January, 2019 Petitioner filed "Notice of Petitioner's Intent to Assert *Losh* Issue." On or about the 25th day of January, 2019, Petitioner asserted a new ground for relief that was not previously asserted at the first (1st) Omnibus Hearing held on or about the 30th day of November, 2017. Petitioner asserts the claim of prejudicial statements by prosecutor

(*Losh* List No. 44) under the umbrella of ineffective assistance of counsel. (Transcript of *State of West Virginia, ex rel., Arnold Wayne McCartney vs. David Ballard, Warden, Mount Olive Correctional Complex*, January 25, 2019 at 9 6:13). The Court heard arguments from counsel and thereafter took the matter under advisement as to whether or not Petitioner can add a new ground for relief that was not asserted at Petitioner's first (1st) Omnibus Hearing, wherein he waived all claims not asserted.

> A judgment denying relief in post-conviction habeas corpus is res judicata on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared pro se having knowingly and intelligently waived his right to counsel. Syl. Pt. 2, *Losh v. McKenzie*, 166 W.Va. at 766-767, 277 S.E.2d at 610.

The Court has considered the matter and hereby **FINDS** that Petitioner may assert an additional ground for relief of prejudicial statements by prosecutor under the umbrella of ineffective assistance of counsel, which has already been asserted, based upon the posture of the case. Petitioner was still presenting evidence and the final Omnibus Hearing did not conclude until January 25, 2019. Furthermore, the Court had not entered an Order ruling on Petitioner's *Habeas Corpus* proceeding. Therefore, the Court **FINDS** Petitioner has a right to add an additional ground for relief prior to the close of the Omnibus Hearing.

Grounds for Relief

> In general, the post-conviction habeas corpus statute, W.Va.Code, 53-4A-1 et seq. (1967) contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal to [the West Virginia Supreme Court of Appeals], and one omnibus post-conviction habeas corpus hearing at which [Petitioner] may raise any collateral issues which have not previously been fully and fairly litigated. *Losh v. McKenzie*, 166 W.Va. at 764, 277 S.E.2d at 609.

The Court will address each ground for relief asserted by Petitioner separately.

I. **Mental Competency at the Time of the Crime/Incompetence at Time of Offense as Opposed to Time of Trial**

Petitioner asserts his (1st) ground for relief is mental competency at the time of the crime/incompetence at time of offense. The record is clear that Petitioner did not undergo a psychological evaluation for competency to stand trial or criminal responsibility during the underlying criminal action. The facts contained in the record indicate Petitioner was intoxicated on the evening of December 20, 2008, when he fatally shot the victim.

Petitioner presented evidence from Bobby A. Miller, II. The Court qualified Dr. Miller as an expert in general psychology and forensic psychiatry. Dr. Miller testified that he is recognized by the State of West Virginia as a qualified forensic psychiatrist to conduct Chapter twenty-seven (27) evaluations. (Transcript of *State of West Virginia, ex rel., Arnold Wayne McCartney vs. David Ballard, Warden, Mount Olive Correctional Complex,* November 30, 2017, at 42 15:18). However, Dr. Miller only conducted a record review on Petitioner's case and did not personally interview Petitioner. (*Id.* at 46 2:19).

Dr. Miller provided the Court a detailed explanation of competency as followed:

> Q. ... [C]ompetency is a fluid thing; one may be competent today, not competent tomorrow, and competent again on Friday?
> A. I think of competence as -- as present tense, and the others as past tense.
> Q. Exactly. So, is there a limit, as far as time going by, as to whether or not you may effectively do an evaluation for criminal responsibility or diminished capacity, or look into -- EED, or mitigation issues?
> A. No; I don't understand.
> Q. Okay. This crime -- let's say a murder -- occurs in nineteen eighty-three (1983); okay? Now, you really can't tell us whether or not he was competent at the time?
> A. Correct.

Based upon the testimony of Dr. Miller and the record herein Petitioner has not presented sufficient evidence to show that Petitioner was not competent at the time he committed the crime.

The Court **FINDS** that Petitioner's claim for mental competency at the time of the crime/incompetence at time of offense was not supported by the evidence presented at Petitioner's Omnibus Hearings. Therefore, Petitioner is not entitled to relief upon the grounds of mental competency at the time of the crime/incompetence at time of offense.

II. **Denial of Counsel**

Petitioner asserts his second (2nd) ground for relief is denial of counsel. Petitioner's "Amended Petition for Writ of *Habeas Corpus* ad Subjiciendum." is devoid of any such claim. Petitioner raised the claim of denial of counsel at his Omnibus Hearing held on the 30th day of November, 2017, wherein the Court went over the *Losh* List and Petitioner asserted the claim of denial of counsel. Petitioner was appointed counsel, Dennis J. Willett, on the 22nd day of December, 2008, and representation continued until Petitioner was sentenced on the 4th day of May, 2010. Furthermore, on or about the 26th day of January, 2009, the Court appointed Petitioner co-counsel, Steven B. Nanners. The Court **FINDS** that Petitioner's claim for denial of counsel is nothing more than a bare bones allegation and Petitioner failed to offer any evidence to support his claim. Therefore, Petitioner is not entitled to relief upon the grounds of denial of counsel.

III. **Unfulfilled Plea Bargain**

Petitioner asserts his third (3rd) ground for relief is unfulfilled plea bargain. Petitioner's "Amended Petition for Writ of *Habeas Corpus* ad Subjiciendum." is devoid of any such claim. Petitioner raised the claim of unfulfilled plea bargain at his Omnibus Hearing held on the 30th day

of November, 2017, wherein the Court went over the *Losh* List and Petitioner asserted the claim of unfulfilled plea bargain. Petitioner did not enter into a plea, rather, Petitioner was tried by a Jury of his peers. The Court **FINDS** that Petitioner's claim of unfulfilled plea bargain is meritless. Therefore, Petitioner is not entitled to relief upon the grounds of unfulfilled plea bargain.

IV. **Ineffective Assistance of Counsel**

Petitioner asserts his forth (4th) ground for relief is ineffective assistance of counsel. Petitioners argues: (1) errors made during the guilt phase of trial and (2) errors made during the mercy phase of trial.

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-prong test established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Syl. Pt. 3, *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. 11, 528 S.E.2d 207 (1999), citing to Syl. Pt. 5, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995).

In evaluating trial counsels performance, the Court starts with the strong presumption,

> [T]hat counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a "wide range." The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most good lawyers would have done. We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately. *State v. Miller*, 194 W.Va. at 16, 459 S.E.2d at 127.
>
> In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable

lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. Syl. Pt. 6, *Id.*

A. Ineffective Assistance of Counsel at the Guilt Phase of the Trial for Failure to Utilize an Expert Witness for the Defense of Diminished Capacity/Voluntary Intoxication

In order for Petitioner to satisfy the first prong of *Strickland*, Petitioner must prove some act or omission of trial counsel that is not the result of reasonable professional judgment. *State ex rel. Vernatter v. Warden, West Virginia Penitentiary*, 207 W.Va. at 17, 528 S.E.2d at 213. Petitioner alleges trial counsels performance was deficient in the guilt phase by counsels "...failure to pursue expert assistance in a diminished capacity defense relating to the Petitioner's state of intoxication at the time of the homicide..." (*Petitioner's Brief in Support of Post-Conviction Habeas Relief*, p. 2).

Petitioner argues that trial counsels attempt to present a diminished capacity defense was wholly inadequate without the assistance of an expert as required by *State v. Joseph*. (214 W.Va. 525, 590 S.E.2d 718 (2003)). *State v. Joseph* states in Syllabus Point 3,

> The diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged. This defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense.

It is clear based upon *State v. Joseph* and the case law that follows that presentment of a diminished capacity defense requires the testimony of an expert witness. (See, *State v. Hamilton*, No. 16-007, (W.Va. Jan. 16, 2017) (Memorandum Decision)). Furthermore, to obtain a ***jury instruction*** for the defense of diminished capacity or voluntary intoxication a Defendant must establish an

evidentiary basis for such instruction through the testimony of an expert. (See, *State v. Pustovarh*, No. 13-1108, (W.Va. Jan. 12, 2015)(Memorandum Decision)). Nonetheless, trial counsel was able to obtain a jury instruction on diminished capacity/voluntary intoxication.

Trial Counsel testified at the Omnibus Hearing that they considered eliciting the help of an expert to pursue a diminished capacity defense but made a tactical decision not to consult with an expert. Steve Nanners (hereinafter "*Trial Counsel Nanners*"), testified as followed at the Omnibus Hearing:

> A. We did not contact an expert -- in this matter because Mr. Willett and I had discussed the issue, and we were concerned that if we brought in an expert, the State would then bring in an expert, and that the State's expert would then -- or the --would explore those -- four oh-four B acts with -- and the threats against Mr. McCartney's other girlfriends, and those things, and that that would be part of the State's expert's opinion. So, we were concerned that it was going to open the door and -- and allow that expert to bring in his prior -- other wrongful acts. (Transcript of *State of West Virginia, ex rel., Arnold Wayne McCartney vs. David Ballard, Warden, Mount Olive Correctional Complex*, January 25, 2019 at 52-53). [sic]

Trial Counsel Nanners was asked regarding his investigation into 404b evidence wherein he responded:

> A. I recall speaking to -- witnesses on that, and -- off the top of my head, the -- the one thing that stands out in my mind was some girl had indicated that Arnie had threatened to cut her throat with a hoof knife and let her bleed out in the driveway, or something to that effect. (*Id.* at 54, 13:19).

Dennis Willet (hereinafter "*Trial Counsel Willett*") further testified why his trial strategy was not to obtain an expert regarding diminished capacity:

> Q. And -- and let me ask -- then, was there any consideration, with you and Steve strategizing, getting ready to take the steps for a trial, to engaging a -- an expert on diminished capacity -- either just to diagnose, analyze, or to appear at the trial? Was there any -- consideration of that option?
> A. Yes. And -- we had -- discussed that with Mr. McCartney, about that -- as that being the defense that we were -- had initially gone on with. And we developed this

evidence, and -- we were worried about, with his history of general -- knowledge around the people, that he did like to drink a lot of beer, become -- and made threats before, that if we'd get an expert to testify to this, to make an -- analysis of this, the State was going to have -- would hire an expert as well. And if our expert didn't address that -- the State was -- the State's expert likely would and would, you know, cream our expert, basically. (*Id.* at 99-100). [sic]

Trial Counsel Nanners further discussed their trial strategy as followed:

Q. So, in short, the strategy here was to argue that he was intoxicated to the point that he could not form the requisite intent, on the guilt phase?
A. Part of the strategy; yes.
Q. What was the rest of it?
Mr. McCartney had -- as I said, three (3) or so different theories: that I did it, but it was an accident; I did it, I was drunk; I did it because I was angry and it was heat of passion, I thought she was cheating on me. So -- it was kind of a -- present all of it and let the jury hear it all. (*Id.* at 64-65).

Trial Counsel Willett further testified that the decision not to use the services of an expert on diminished capacity was to protect Petitioner. (*Id.* at 101).

Counsel for the Petitioner argues trial counsels' decision not to use an expert witness was not based upon an adequate investigation and was constitutionally defective. This Court disagrees. The Court **FINDS** that Trial Counsel developed a strategic plan not to employ an expert witness to protect Petitioner and the possible presentment of prior instances of violence against woman and heavy drinking. The Court **FINDS** that Trial Counsel presented ample evidence of Petitioner's voluntary intoxication and ***was able to obtain jury instruction on voluntary intoxication/diminished capacity despite the requirements of State v. Joseph***. The Court **FINDS** that Petitioner has failed to satisfy the first prong of the Strickland test in showing Counsel's performance was deficient under an objective standard of reasonableness concerning failure to utilize an expert witness with regard to the defense of voluntary intoxication/diminished capacity. Furthermore, based upon the totality of the evidence presented at trial, the Court **FINDS**

that it is not reasonably probable that expert testimony regarding Petitioner's level of intoxication would have changed the results of the jury verdict.

B. Ineffective Assistance of Counsel at the Guilt Phase of the Trial for Ineffective Cross Examination and Impeachment of State's Witnesses

Petitioner asserts Trial Counsel failed to conduct effective cross examination of witnesses and failed to impeach State witnesses regarding Petitioner's demeanor and level of intoxication during the commission of the offense. The trial transcript is replete with evidence showing Petitioner's level of intoxication. The Court **FINDS** Petitioners claim is not supported by the evidence.

C. Ineffective Assistance of Counsel at the Guilt Phase of the Trial for Failure to Draft/Propose Jury Instruction Related to Accidental Shooting and Failure to Utilize Ballistics Expert

Petitioner additionally asserts Trial Counsel failed to conduct adequate and effective representation during drafting and proposing jury instruction for Petitioner's trial with regard to his defense that the shooting was an accident. The Court **FINDS** that Petitioner failed to support this claim by evidence presented at the Omnibus Hearing.

Petitioner also asserts Trial Counsel failed to consult with or seek approval of funds to retain expert witnesses to conduct an independent examination regarding firearms, ballistics or forensic pathology. The record is clear, Trial Counsel did not employ an expert on firearms, ballistics or forensic pathology. At trial, the State presented expert testimony of Phillip Kent Cochran who was qualified as an expert in the area of firearm and tool mark examiner. Mr. Cochran testified that the weapon used in the crime was a Wesson Firearm revolver chambered in .41 magnum. Mr. Cochran testified the firearm was test-fired and examined for mechanical

function and safety and no problems were discovered. Mr. Cochran further testified,

> ...[t]he single action trigger was found to hold three and three quarter pounds of pressure and fired with four pounds of pressure. The double action trigger was found to hold 11-1/4 pounds of pressure and fired with 11-1/2 pounds of pressure. The internal transfer bar functioned as desired and the cocked hammer did not push off during examination. Based on these examinations, in my opinion, the Wesson Firearms revolver, State Exhibit #11, functioned as designed. (Transcript of *State of West Virginia vs. Arnold Wayne McCartney*, 09-F-08, February 17, 2010 at 318).

Petitioner has failed to present any evidence to contradict the State's expert concerning the murder weapon. Even if the Court found Trial Counsel's performance was deficient under an objective standard of reasonableness for failing to employ an expert the Court could not find there is a reasonable probability that, but for counsel's errors, the result would have been different.

D. Ineffective Assistance of Counsel for Failure to Object to Prejudicial statements of Prosecutor

Petitioner asserts a claim for prejudicial statements of the Prosecutor under the umbrella of ineffective assistance of counsel. During closing arguments on the guilt phase of the trial the prosecutor stated "[b]ut letting a murderer go invites a repeat of the same crime" (*Id.* at 408). Petitioner alleges Trial Counsel did not object to the improper argument by the State. Trial Counsel did object at the close of the Prosecutor's summation and the matter was discussed at the bench.

> (At the Bench.)
> MR. WILLETT: Judge, I didn't want to object during Mr. Morris's rebuttal summation, but we did have an objection and want to ask this Court to instruct the jury to disregard Mr. Morris's statement regarding, "If we don't put this murderer away it invites it to happen again." I think that's improper argument.
> BY THE COURT: Well, I thought your- argument was improper but there was no objection to it, either. I think it would be worse to say something to them about it than just let it go.
> MR. WILLETT: Yes, sir.
> BY THE COURT: I'll just let it go. (*Id.* at 408-409).

Petitioner raised this very issue on appeal to the West Virginia Supreme Court of Appeals and the Court made the following findings:

> After reviewing the record in its entirety, it is clear that the challenged remark was an isolated comment, was limited in nature, was not made to divert the jury into irrelevant or improper matters, and was not inappropriate in the context of the charge and the evidence presented therein. The circuit court considered the petitioner's request for a limiting instruction, considered the fact that the petitioner's counsel had not objected at the time the remark was actually made, and thereafter made a reasoned decision that highlighting the isolated comment could impact the jury in a negative manner. The evidence in this case was overwhelming. The petitioner shot his girlfriend in the head and killed her. He admitted that he shot her, but claimed that while he and the victim were arguing, that he grabbed his gun from another room of his home, pointed it at her head, and accidentally pulled the trigger. The evidence also showed that the petitioner was arguing with the victim prior to the murder and that he suspected that she had been having a relationship with another man. There is no evidence that this isolated comment prejudiced the petitioner or resulted in manifest injustice. The relevant standard is therefore not met and the circuit court did not err in declining to give a corrective instruction which would have only served to draw further attention to the challenged remark. *State v. McCartney*, 228 W.Va. 315, 331-332, 719 S.E.2d 785, 801-802 (2011).

Pursuant to the post-conviction habeas corpus statute, Petitioner is entitled to "...a fair trial in the circuit court, an opportunity to apply for an appeal ... and one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated." *Losh v. McKenzie*, 166 W.Va. at 764, 277 S.E.2d at 609. Petitioner's claim of prejudicial statements of the prosecutor has been fully and fairly litigation by the West Virginia Supreme Court of Appeals in Petitioner's direct appeal of his underlying conviction. (See, *State v. McCartney*, 228, W.Va. 315, 719 S.E.2d 785). Petitioner crouches his ground for relief for improper statements by the Prosecutor under ineffective assistance of counsel. Petitioner argues Trial Counsel failed to object to the improper statement by the Prosecutor. Trial Counsel did in fact object and requested a limiting instruction. Such relief was denied by the Trial

Court who specifically found it would be worse to bring it up again to the jury rather than not saying anything. The Court **FINDS** Petitioner's claim for ineffective assistance of counsel for failure to object to improper statements by the Prosecutor is without merit and Petitioner is not entitled to relief on this ground. The Court further **FINDS** that this issue was fully and fairly litigated on direct appeal to the West Virginia Supreme Court of Appeals.

E. Ineffective Assistance of Counsel at the Mercy Phase of the Trial- Trial Counsel Failed to Argue for Mercy on Petitioner's behalf or Present Mitigating Testimony or Evidence on Petitioner's Behalf.

Petitioner alleges Trial Counsels' performance was deficient in the mercy phase of the trial by failing to properly prepare Petitioner to testify on his own behalf and by failing to make a plea of mercy on behalf of Petitioner. It is clear from the trial transcript, the Court proceeded to the mercy stage of the trial after a sixteen (16) minute recess following a guilty verdict for murder in the first (1st) degree. There was some discussion on the record that the Prosecutor intended to call the victim's mother and father during the mercy phase of the trial. Trial Counsel objected to the State calling these witnesses because they were not disclosed or named during the voir dire of the jury. The Court took a short recess and upon resumption of the trial the State elected not to present any witnesses.

Trial Counsel Willett testified that he discussed with Petitioner requesting a continuance to call in witnesses to testify on behalf of Petitioner. Trial Counsel Willett worked out a deal with the State wherein Petitioner would testify and both parties would not call any additional witnesses. Trail Counsel Willett expressed concerns about the State bringing in prior bad acts of the Petitioner and testimony from Petitioner's ex-girlfriends. Trial Counsel Willett testified after consulting

with Petitioner the decision was made to forgo calling witnesses to testify in exchange for the State not calling any witnesses. (Transcript of *State of West Virginia, ex rel., Arnold Wayne McCartney vs. David Ballard, Warden, Mount Olive Correctional Complex*, January 25, 2019 at 110 4:23).

Trial Counsel Nanners testified at the Omnibus Hearing:

> A. Well, what we did was work out an agreement with Gary that we would allow -- Arnie McCartney to get up on the stand and explain to the jury, you know, his remorsefulness, and that he was sorry. And then, Gary Morris would agree that he would not put on the four oh-four B (404b) evidence. (Transcript of *State of West Virginia, ex rel., Arnold Wayne McCartney vs. David Ballard, Warden, Mount Olive Correctional Complex*, January 25, 2019 at 27 10:14). [sic]

Trial Counsel failed to present an opening statement or closing statement at Petitioner's mercy phase of trial. Trial Counsel never even asked the jury to give Petitioner mercy. It is clear for the record that little, if any, preparation was made in the mercy phase of the trial. The testimony elicited at the Omnibus Hearing by Petitioner is that he was prepared to testify at the mercy stage of trial during the short recess following the guilty verdict of murder in the first (1st) degree. The Court **FINDS** based upon the totality of the circumstances, Trial Counsels' performance during the mercy phase of the trial was wholly inadequate. Trial Counsel failed to prepare Petitioner to testify at the mercy phase of trial, failed to prepare any witnesses to testify on Petitioner's behalf, and failed to ask the jury for mercy for their client. Trial Counsel claims the decision was made not to give an opening or closing statement based upon their agreement with the Prosecutor that Petitioner would be the only testimony and evidence presented at the mercy phase of trial. This "agreement" was not memorialized in writing or put on the record, leaving the details a mystery. Even if the failure to make an opening or closing statement was by some

agreement, this Court concludes it is not a reasonable strategy to fail to request mercy on behalf of your client.

The second (2nd) prong of *Strickland* requires Petitioner prove "... that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). While this seems an impossible standard for a reviewing court to find, without replacing its judgment for the judgment of a jury, in this case this Court is obliged nonetheless to make an analysis. While the Court in *State ex rel. Shelton v. Painter*, 221 W.Va. 578, 655 S.E.2d 794 (2007), found ***comments made by counsel*** could prejudice a Defendant with regard to the mercy phase, the Court was silent on Counsel's ***failure to comment***.

In the present case, there has been no evidence presented that counsels failure to argue either in opening or closing of the mercy stage would significantly change the outcome of the mercy phase. This Court is unaware of any additional information that would have been adduced at trial in this matter, which could be have been used as a verbalization of a request for mercy and that would have created a "reasonable probability" of a different outcome in this matter. None was made a part of the Writ of Habeas Corpus in this matter. Much was made of the Petitioner's progress while incarcerated since his conviction and subsequent incarceration, but this is not relevant to this Court's analysis on this issue.

In *State ex rel. Shelton*, the Court concluded "... defense counsel's closing argument contained no meaningful plea for mercy..." and found the second (2nd) prong of Strickland "satisfied." *Id.* at 586, 802. However, the Court in *State ex rel. Shelton* looked at the totality of the circumstances above and beyond the lack of a mercy plea to conclude the second (2nd) prong

of Strickland satisfied. Here, the totality of the circumstances do not weigh as heavily towards satisfying the second (2nd) prong of Strickland, therefore this Court **FINDS** the second (2nd) prong of Strickland is not satisfied.

Petitioner argued on appeal that he was not permitted the opportunity to give a closing argument, however, the West Virginia Supreme Court of Appeals found that counsel for the Petitioner could have made a closing argument, ***but chose not to***. *State v. McCartney*, 228 W.Va. at 329, 719 S.E.2d 785 at 799 (2011). Therefore, this Court **FINDS** counsels failure to address the jury and make a meaningful plea for mercy on Petitioner's behalf to not be grounds for *habeas* relief.

V. **Refusal to Subpoena Witnesses**

Petitioner asserts his fifth (5th) ground for relief as refusal to subpoena witnesses. Petitioner asserted at his Omnibus Hearing that Trial Counsel failed to subpoena character witnesses at both the guilt and mercy phase of his trial. Petitioner does not assert any specific witness that would have testified on his behalf or what that testimony would have elicited. The Court **FINDS** that Petitioner has failed to present a factual basis for the assertion of refusal to subpoena witnesses. Therefore, Petitioner is not entitled to relief upon the grounds of refusal to subpoena witnesses.

VI. **Instructions to the Jury**

Petitioner asserts his sixth (6th) ground for relief as instructions to the jury. The Court is unclear what, if any, instructions to the jury that Petitioner is asserting were in error. The evidence presented at the Omnibus Hearings is that Petitioner was able to obtain a jury instruction on diminished capacity even though Petitioner was technically not entitled to such instruction without

the use of an expert. Petitioner has not presented any evidence at his Omnibus Hearings to challenge the instructions to the jury presented at Petitioner's trial. Furthermore, Petitioner's final brief is devoid of any factual basis or argument regarding instructions to the jury. The Court **FINDS** that Petitioner has failed to present a factual basis for the assertion of instructions to the jury. Therefore, Petitioner is not entitled to relief upon the grounds of instructions to the jury.

VII. **Sufficiency of the Evidence**

Petitioner asserts his seventh (7th) ground for relief is sufficiency of the evidence. The West Virginia Supreme Court of Appeals places a heavy burden on a Defendant challenging the sufficiency of the evidence after conviction by a jury.

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.... Syl. Pt 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Petitioner raised the same challenge on direct appeal wherein the West Virginia Supreme Court of Appeals denied Petitioner's appeal and found there was ample evidence presented to convict Petitioner of murder in the first (1st) degree. The West Virginia Supreme Court of Appeals specifically found,

> ...the State presented evidence from which the jury could have concluded that the petitioner committed first degree murder. The State demonstrated that the petitioner physically abused the victim and then escalated this violence by using a gun to threaten and then kill her. The State then presented evidence that the petitioner shot the victim in the head at close range with a gun that was shown by experts to have

> been in perfect working order. Moreover, based upon the evidence presented, a jury could have concluded that the petitioner's actions did not result from grabbing the gun in a fit of blind rage. Instead, a jury could have concluded that he deliberately left the bedroom, grabbed the loaded gun from another room, returned and held it to the victim's head and threatened her with it. Then, jurors could have concluded, based upon the petitioner's own statements, that he pulled the trigger and killed the victim. Jurors could have also concluded that the petitioner's motive was malicious retribution for the victim's supposed infidelity with Mr. Joseph and her refusal to admit it. In this case, it is undeniable that the jury was presented with sufficient evidence to support its finding that the petitioner was guilty of the underlying crime beyond a reasonable doubt. Therefore, this Court finds no error regarding this issue. *State v. McCartney*, 228 W.Va. at 334, 719 S.E.2d at 804.

Pursuant to the post-conviction habeas corpus statute, Petitioner is entitled to "...a fair trial in the circuit court, an opportunity to apply for an appeal ... and one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated." *Losh v. McKenzie*, 166 W.Va. at 764, 277 S.E.2d at 609. Petitioner's claim of sufficiency of the evidence has been fully and fairly litigation by the West Virginia Supreme Court of Appeals in Petitioner's direct appeal of his underlying conviction. (See, *State v. McCartney*, 228, W.Va. 315, 719 S.E.2d 785). Furthermore, Petitioner has not presented any evidence at his Omnibus Hearings to challenge the sufficiency of the evidence presented at Petitioner's trial. Petitioner's final brief is devoid of any factual basis or argument regarding the sufficiency of the evidence the State presented at trial. The Court **FINDS** that Petitioner's ground for relief of sufficiency of the evidence is res judicata and furthermore Petitioner has failed to present a factual basis for the assertion of his claim. Therefore, Petitioner is not entitled to relief upon the grounds of sufficiency of the evidence.

WHEREFORE, based upon the Court's findings of fact and conclusions of law, as set forth above, it is accordingly adjudged and **ORDERED** that the *Amended Petition for Writ of Habeas*

Corpus filed herein, is hereby **DENIED.**

It is further adjudged and **ORDERED** that the Petitioner herein continue serving the sentence heretofore imposed upon him in Case No. 09-F-41.

It is further adjudged and **ORDERED** that the Clerk of this Court make and prepare certified copies of this Order and transmit the same to the parties of record, the Sheriff of Lewis County, and the West Virginia Division of Corrections.

ENTERED this the **18th** day of **February, 2020**.

KURT W. HALL
Circuit Court Judge

PETITION UNDER W.Va. CODE § 53-4A-1 FOR WRIT OF HABEAS CORPUS

STATE OF WEST VIRGINIA	County: Lewis	
Name (under which you were convicted): Arnold McCartney	Prisoner No. 50930	Case No.: 13-C-12
Place of Confinement: Mount Olive Correctional Complex One Mountainside Way Mount Olive, WV 25185		
Name of Petitioner (include name under which convicted): Arnold McCartney	v. Name of Respondent (person with custody of person): David Ballard, Warden	

PETITION

1. Name and location of court which entered the judgment of conviction under attack : Lewis County Circuit Court

2. Date of judgment of conviction : February 18, 2010

3. Length of Sentence : Life without mercy

4. Nature of offense involved (all counts): First-Degree Murder

5. What was your plea? (Check One)
   (a) Not Guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check One)
   (a) Jury Trial ☒
   (b) Judge Only ☐

7. Did you testify at trial?
   Yes ☐ No ☒ Testified only at penalty-phase.

8. Did you file a direct appeal from the judgment of conviction in the Supreme Court of Appeals?
   Yes ☒ No ☐

9. If you did appeal, answer the following :

(a) Date of Filing: On or about November 1, 2010.

(b) Grounds Raised: See Attachment.

(c) Was the Petition Granted ☒ or Refused ☐

(d) If Refused, what was the date of refusal ? _____

(e) If Granted, give date and type of result and citation, if known:

State v. McCartney, 719 S.E.2d 785 (2011) (*per curiam*)

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. **If your answer to 10 was "Yes," give the following information:**

(a) (1) Name of Court: Supreme Court of the United States

(2) Nature of Proceeding: Writ of Certiorari

(3) Grounds Raised: See Attachment

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result: Denied

(6) Date of Result: October 1, 2012

(b) **As to any second petition, application or motion give the same information:**

(1) Name of Court: N/A

(2) Nature of Proceeding:

(3) Grounds Raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result:

(6) Date of Result:

(c) Did you appeal to the State's highest Court having jurisdiction to result of any action taken on any petition, application or motion?

First Petition — Yes ☐ No ☐

Second Petition — Yes ☐ No ☐

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the circuit court, you must state grounds that have NOT been previously and finally adjudicated or waived. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, *you should raise in this petition all available grounds* (relating to conviction) on which you base you allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained by an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand jury or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of the right to appeal.

A. Ground One:

See attached Memorandum in Support.

Supporting FACTS (state briefly without citing cases or law) :_____

_____

_____

_____

_____

_____

_____

B. Ground Two:_____

_____

Supporting FACTS (state briefly without citing cases or law) :_____

_____

C. **Ground Three:**

Supporting FACTS (state briefly without citing cases or law) :

D. **Ground Four:**

Supporting FACTS (state briefly without citing cases or law) :

13. If any of the grounds listed in 12A, B, C, or D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

14. Do you have any petition or appeal no pending in any Court, either State of Federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing : Dennis Willet, Steven B. Nanners
45 West Main Street
Buckhannon, WV 26201
(304) 472-2048

(b) At arraignment and plea : Same

(c) At trial : Same

(d) At sentencing : Same

(e) On Appeal : Same

(f) In any Post-Conviction Proceeding :_____

_____

(g) On Appeal from any adverse ruling in a Post-Conviction Proceedings :_____

_____

16. Have you, or an attorney representing you, obtained a transcript of the criminal proceedings which resulted in the conviction under attack?
Yes ☒ No ☐

17. If your answer to 16 was "no," have you submitted an Appellate Transcript Request form for transcripts to the circuit court, a court reporter, or any other tribunal or individual?
Yes ☐ No ☐ N/A ☐

18. If your answer to 17 was "Yes," attach a copy, if available, of the Appellate Transcript Request form and provide the name of the court or person to whom it was submitted and the date of the submission.
(a) Copy of Request is Attached ☐

(b) Date :_____

(c) Name: _____

19. Were you sentenced on more than one count of an indictment, or on more than one indictment in the same court and at the same time?
Yes ☐ No ☐

20. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:_____

_____

(b) Give date and length of the above sentence:_____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence

to be served in the future?

Yes ☒ No ☐

Wherefore, petitioner Prays that the Court Grant petitioner relief to which he may be entitled in this proceeding.

N/A

Signature of Attorney, if any

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: 1-14-2013
(Date)

Arnold McCartney

Signature of Petitioner

Direct Appeal

On or about 1 November 2010, the Petitioner filed with the West Virginia Supreme Court of Appeals his Direct Appeal asserting that the Circuit Court erred by:

1. Failing to conduct his trial within one term of court;
2. Ruling that a statement taken by the investigator was admissible;
3. Improperly admitting the murder weapon into evidence at trial despite the State's failure to establish a chain of custody;
4. Admitting certain testimonial evidence relating to the victim's cause of death;
5. Not affording the Petitioner the opportunity to present a closing argument during the "mercy phase" of the trial;
6. Including an improper jury instruction; and
7. Failing to address improper prosecutorial statements during closing arguments.

The Petitioner further argued that the cumulative effects of these errors warranted reversal of his conviction. Petitioner also asserted that his conviction should be reversed because the indictment was fatally defective. Lastly, the Petitioner argued that the evidence was insufficient to support his conviction. Dennis J. Willet, Esq., and Steven B. Nanners, Esq., Buckhannon, West Virginia file Petitioner's Direct Appeal, and were counsel of record for the Petitioner's entire criminal proceedings.

On 17 November 2011, the WVSCA's affirmed the Petitioner's convictions in *State v. Arnold Wayne McCartney*, _____ W. Va. _____, 719 S.E.2d 785 (2011) (*per curiam*).

Certiorari

On 7 March 2012, counsel of record filed with the Supreme Court of the United States, Petitioner's Petition for Writ of Certiorari asserting the following:

I. The Circuit Court of Lewis County, West Virginia, erred in denying the Petitioner's Motion to Dismiss for failing to afford the Petitioner a speedy trial due solely to the State's failure to

provide timely discovery.

II. The Circuit Court of Lewis County, West Virginia, erred in ruling that the Petitioner's confession adduced by the investigating officer at the Central Regional Jail on December 21, 2008, was admissible.

III. The Circuit Court of Lewis County, West Virginia, improperly admitted the alleged murder weapon into evidence without the State having properly established a chain of custody thereto.

IV. The Circuit Court of Lewis County, West Virginia, erred in admitting into evidence testimonial evidence relating to the victim's cause of death.

V. The Petitioner was denied fundamental Due Process of Law with respect to the conduct of the proceedings held during the "mercy" phase of the trial following the Petitioner's conviction for First-Degree Murder.

VI. The Petitioner hereto was denied his right to a fair trial based upon the Circuit Court's denial of Counsel's objection to the State's proposed instructions.

VII. The Circuit Court of Lewis County, West Virginia, erred in failing to address improper and prejudicial statements made by the prosecuting attorney to the jury during closing argument.

VIII. The indictment returned against the Petitioner was fatally defective insofar as the same failed to properly identify the alleged victim of the offense.

IX. The cumulative error occurring during the Petitioner's trial proceedings requires a reversal of his conviction upon the charge of murder, in the First-Degree, and the sentence of Life Imprisonment without Mercy.

X. The evidence adduced at Petitioner's trial was insufficient to support his conviction should require a reversal of the Petitioner's conviction upon the

charge of Murder in the First-Degree, and his sentence to Life Imprisonment without mercy.

On 1 October 2012, the Supreme Court of the United States refused to hear the Petitioner's Writ of Certiorari.

VERIFICATION OF PETITION

I, Petitioner herein, [Petitioner], do swear and attest the facts and Statements contained herein are True and Correct to the Best of my Knowledge and Beliefs. As to those Statements based upon information of others, of Facts represented by others or founded upon their testimonies, I believe same to be True and Correct and do so represent to this Court the same as True and Correct and True in Representation as believed by me under penalties of perjury. All information in this Petition is set forth thereby as Truth. All documents represented and set forth are True and accurate so presented. It is so Sworn.

Respectfully Sworn and Attested

Date: 1-14-2013

[Petitioner], *Pro Se.*
Mount Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,

ARNOLD McCARTNEY,
Petitioner,

v. **Civil Action No. (13-C-12)**

DAVID BALLARD, Warden
Mount Olive Correctional Complex,
Respondent.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION AND JURISDICTION STATEMENT.

The Petitioner Arnold McCartney, was found guilty of first-degree murder on February 18, 2010. Because the trial was a bifurcated proceeding, the Court proceeded with the penalty phase of the trial, whereat the only evidence of mitigation offered by trial counsel in support of convincing the jury to add the recommendation of "mercy" to their verdict was the testimony of the Petitioner. The State did not offer any testimonial evidence. The jury started their deliberations at 12:01 p.m. and at 12:13 p.m. they returned their verdict (recommendation) of "no mercy".

This Honorable Court has been vested with the plenary authority to entertain this Writ of Habeas Corpus pursuant to the West Virginia Post-Conviction Habeas Corpus Act of 1967, §§ 53-4A-1 through 53-4A-1; concomitant with, The Rules Governing Post-Conviction Habeas Proceedings in West Virginia (Rules 1 through 10).

At this time, the Petitioner respectfully moves this Honorable Court to issue a Show Cause Order directing the Respondent to show cause, any if he can, why he should not be released from his unlawful incarceration, as he is being hourly and daily deprived of his Liberty in contravention of the State and Federal Constitution. The Petitioner offers the following in support thereof:

II. LEGAL ARGUMENT.

The Petitioner's right to Effective Assistance of Counsel was violated. This fundamental right is guaranteed by the Sixth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment; and Article III, § 14 of the West Virginia Constitution.

Standard of Review

In West Virginia Courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different, Accorded, Syl. Pt. 5, of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

A. Trial Counsel Rendered Inadequate Representation at the Penalty-Phase of the Petitioner's Bifurcated Trial.

The Petitioner contends that his trial counsel, Dennis J. Willet and Steven B. Nanners had a duty to introduce character evidence - relating to his "past, present and future" in assisting the jury in reaching its decision whether or not the Petitioner "is a person who is worthy of a chance to regain his freedom." Moreover, the Petitioner evinces that trial counsel's failure to introduce mitigating evidence at the penalty-phase of his trial for first degree murder, irrevocably prejudiced him, because

the jury's decision not to recommend mercy was not based on the appropriate factors. The importance of whether or not a criminal defendant should be given a chance to regain his freedom cannot be overstated. The USSC stated: "life without parole forswears–altogether the rehabilitative ideal." *Graham v. Florida*, 560 U.S. ____ (2010) (slip op., at 23). In the traditional sense of rehabilitation, the Petitioner should have never been foresworn altogether, a chance for rehabilitation, because he was not a criminal, he can be restored to his former constructive capacity. There exists an earlier condition of being responsible in which to restore him too.

Furthermore, trial counsel's failure to present such character evidence was exacerbated by allowing the Petitioner to testify on his own behalf in an attempt to mitigate his potential sentence. The Petitioner's testimony was inherently prejudicial inasmuch it only reiterated the narrow circumstances of the charged offense that had been previously adduced at the guilt phase of his trial, instead of the required "broader picture of his character."

The West Virginia State Supreme Court of Appeals ("WVSCA"), in *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), held: "[a] trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy". Id. at Syl. Pt. 4.

In several opinions the WVSCA has discussed the scope of evidence which may be admitted during the mercy phase of a first-degree murder proceeding. For instance, the Court has stated that:

> "the jury looks at all the evidence that the defendant and the prosecution have put on-and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination." *State v. Rygh*, 206 W.Va. at 297 n.1, 524 S.E.2d at 449 n.1 (1999).

However, in *State v. Finley*, 219 W. Va. at 752, 639 S.E.2d at 844 (2006), the Court stated that:

> "[a]t the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character-examining the defendant's past, present and future according to the evidence before it-in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom." See *Zant v. Stephens*, 462 U.S. 862, 900, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in judgment) (at the penalty stage a jury considers the character and propensities of a defendant in order to make a "unique, individualized judgment regarding the punishment that a particular person deserves.").

Further, in a dissenting opinion to *Schofield v. West Virginia Department of Corrections*, 185 W. Va. 199, 406 S.E.2d 425 (1991) (Workman, J., dissenting), the following rationale for a bifurcated proceeding was set forth:

> "a bifurcated hearing on the issue of mercy would not only permit the defendant a far broader latitude in presenting to the jury full information concerning the defendant's life and circumstances and any mitigating evidence in an effort to obtain the balm of mercy. It would also permit the State an opportunity to present any information at its disposal as to the propriety (or lack thereof) of a grant of mercy. If a particular Defendant has an egregious criminal history or a marked propensity for violence, for example, that would also be an appropriate factor for the jury to consider. The determination of whether a defendant should receive mercy is so critically important that justice for both the State and Defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits." Id. at 207, 406 S.E.2d at 433.

Finally, the WVSCA in Syl. Pt. 7 of *State v. Mclaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010), held that:

> "The type of evidence that is admissible in the mercy phase of a bifurcated first-degree murder proceeding is much broader then the evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the

defendant guilty of first-degree murder, so long as that evidence is found by the Trial Court to be relevant under 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence."

After, the jury returned their verdict of guilty of first-degree murder. The Court instructed the jury to the following:

> "Ladies and gentlemen of the jury, you have decided the guilt of the Defendant and have found the Defendant guilty of Murder in the First-Degree. Under the laws of the State of West Virginia, the Defendant, having been found guilty of Murder in the First-Degree, the Court must sentence him to confinement in the penitentiary for life and shall not be eligible for parole unless you, in your discretion, further find and add to your verdict a recommendation for mercy..." (Tr.T. at 423),
>
> "Now, the parties will now present to you, for your consideration, additional evidence, in addition to that evidence that you previously heard in this case, which you may consider in arriving at your decision, which is your sole discretion as whether or not to recommend mercy as to the charge of first-degree murder." Id.

At the penalty-phase the State did not put on any evidence , testimonial or otherwise. Trial Counsel made a decision to offer testimony in their attempt to persuade jurors to add a recommendation of "mercy" to their verdict.

The Petitioner testified to evidence that had been already established at the guilt-phase of the trial. (See Petitioner's Exhibit 1). This was diametrically opposed to what the WVSCA implied in *Finley, supra*, stating: ("at the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character - examining the defendant's past, present and future according to the evidence before it - in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom ...").

The Petitioner posits that from the above statement of the WVSCA that this rationale was gleaned from the USSC case of *Zant v. Stephens*, *supra*, wherein, the Court opined in the text a

"performance utterance" which is an expression that is not only articulated but is also operative, that: "at the penalty stage a jury considers the character and propensities of the defendant in order to make a 'unique, individualized judgment regarding the punishment that a particular person deserves.'"

In the instant case, if Trial Counsel would have conducted even a minimal investigation, they would have found a plethora of favorable character evidence that could have been presented to the jury. See *Wiggins v. Smith*, 529 U.S. 510, 521, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003) ("A failure to make either reasonable investigation or a reasonable decision that investigation was unnecessary has been held to be ineffective assistance of counsel"); *Strickland v. Washington*, 466 U.S. 688, 691, 80 L.Ed.2d 674 (1984) ("Counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary"); and *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007) ("Counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed"). All of the available evidence that would have been found there through a minimal investigation was favorable, and would not have pointed to any propensity, whatsoever, that the Petitioner ever acted in anger or violence. In fact, they would have found that the Petitioner was well-liked in the community, trusted, and was always ready and happy to help someone in need. (See: the notarized letters that reflect the abovementioned. (Exhibits 2). Trial Counsel could have capitalized at the penalty-phase of the proceeding with this evidence, by eliciting more advantageous testimony from the potential witnesses.

Next, Trial Counsel could have presented to the jury evidence of what the Petitioner's present activity was while he was incarcerated:

1. Certificate of Baptism, March 3, 2009;
2. Certificate of Completion, Real Life Parenting Skills
   (1) Handling Anger; October 1, 2009;
   (2) Setting Rules and Limits, October 1, 2009;
   (3) Building Trust, September 24, 2009;
3. Certificate of Completion,
   (1) Cognitive-Behavior, September 9, 2009;
4. Certificate of Completion,
   (1) Anger, Power, Violence and Drugs, September 11, 2009;
   (2) Becoming Whole, September 11, 2009;
   (3) Growing up Male, September 11, 2009;
5. Certification of Completion,
   (1) Managing Money, September 24, 2009;
   (2) Refusal Skills, September 21, 2009;
   (3) Values and Personal Responsibility, September 17, 2009;
   (4) Hygiene and Self-Care, September 14, 2009;
   (5) Making Decisions, September 14, 2009;

(See Exhibit 3).

The Petitioner posits that his participation in these classes before his trial could have been an influencing factor in the jury recommending mercy. It was indicative of the Petitioner's character during the 'present', amid adverse circumstances. It showed his willingness to accept responsibility for his actions. This would have been probative evidence of "a person who is worthy of a chance to regain freedom". *Finley, supra.*

In adhering to the spirit and letter of *Finley, supra*, which stated: "[i]n order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character-examining the defendant's past, present and future according to the evidence before it [...]" Id., the Petitioner's future could very well have been predicted by his past and present. Dr. Stanton E. Samenow opined: "[r]ehabilitation as it has been practiced cannot possibibly be effective", he

writes in his penetrating book, Inside the Criminal Mind, "because it is based on a total misconception. To rehabilitate is to restore to a former constructive capacity or condition. There is nothing to which to rehabilitate a criminal. There is no earlier condition of being responsible to which to restore him". Id.

To recapitulate, the Petitioner's character in the past reflected that he was not a person, who was known to be an angry person nor a violent person and was always ready to help someone in need, he was a dependable worker and parent; his character as relating to the 'present' (at the time of his incarceration for the charged offense), was of a person who admitted he had issues, who voluntarily participated in classes that were available to him while he was incarcerated, before his trial. Furthermore, the Petitioner did not have an "egregious" criminal history, this is indicative of a person who could realistically have been restored to his former constructive and responsible self.

Under the first prong of the *Strickland/Miller* test, *supra*, the Petitioner must show that his Trial Counsel's performance was deficient and "fell below an objective standard of reasonableness" based on the situation at the time rather than on hindsight. *Strickland*, 466 U.S. at 688-90. The Petitioner has shown from the evidence that was available at the time of his penalty-phase trial of his character, as suggested by the WVSCA in *Finley, supra*, would have been valuable mitigating evidence that would have been crucial in aiding the jury in their decision to recommend mercy. A reasonably competent attorney would have presented this mitigating evidence to a jury. Trial Counsel's error should not be presumed to have been a reasonable strategic choice[.] Id. at 690-91. In considering an ineffective assistance of counsel claim, courts should not conjure up tactical decisions an attorney could have made, but plainly did not. It is a difficult enough task for a reviewing court to pass judgment upon what was, without straying into a nebulous supposition of

what might have been. *Tice v. Johnson*, 647 F. 3d. 87 (4th Cir. 2011).Accordingly, the Petitioner as a matter of law, has shown Trial Counsel's performance "fell below on objective standard of reasonableness." Id.

The second prong of the *Strickland/Miller* standard compels the Petitioner to demonstrate a "reasonable probability", or by somewhat less than a preponderance of the evidence that, but for the alleged constitutional deficiency in Trial Counsel's representation, he would have received a recommendation of mercy. The Petitioner posits that he has shown that there exists a "reasonable probability" as a matter of law, that had Trial Counsel presented the aforementioned evidence, he would have received a recommendation of "mercy" by the jury.

Therefore, this Court should in the interest of the fair dispensation of justice reverse the penalty-phase of the Petitioner's trial and conduct a new penalty-phase trial consistent with *State v. Mclaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010) (directing the proper procedures in a bifurcated proceeding.

B. Defense Counsel Failed to Investigate the Law and Facts in Regard to the Proper Intoxication Instruction.

1. Summary of Argument:

Defense Counsel did not investigate the law and facts of the Petitioner's case, regarding the proper intoxication instruction to be presented to the jury for its consideration. The West Virginia Supreme Court of Appeals in *State v. Keeton*, infra, held: "[when] it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance may reduce murder in the first-degree to murder in the second-degree , as long as the specific intent did not antedate the intoxication. Trial Counsel's performance was 'deficient' under an objectionable standard of

reasonableness; and there exists a 'reasonable probability' that, but for Counsel's unprofessional error, there would have been a different outcome in the proceedings. The Petitioner would have been convicted of second-degree murder.

2. **Discussion of Law**:

It is well-settled, that jury instructions are the last word to the jury before they take on the momentous task of deciding a defendant's fate. With this in mind, it is only elementary that a thorough preparation of jury instructions at the outset forces Counsel to focus on the prosecution's evidence, as it relates to the essential elements of the charged crimes, requires counsel to formulate a cogent theory of defense based upon the available evidence, and provides Counsel with a clearly focused objective toward which to tailor presentation of the evidence. It is principled that jury instructions are complete, correct instructions, which are a fundamental and vital right, absolutely necessary to the fair dispensation of justice in jury trials. Counsel has an absolute duty to his client to provide 'lucid guidelines' to enable the jury to apply the law to the facts of the defendant's case.

See *Strickland v. Washington*, 466 U.S. 668, 691, 80 L.E.2d 674 (1984) ("Counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary"); *United States v. Mooney*, 497 F.3d 397, 404 (4th Cir. 2007) ("Counsel in criminal cases are charged with the responsibility of conducting appropriate investigations, both factual and legal, to determine if matters of defense can be developed"); *United States v. Barbour*, 813 F.2d 1232, 1234 (D.C. Cir. 1987) ("it is especially important that counsel adequately investigate the case in order that at the very least he can provide minimally competent professional representation"); and, *State ex rel. Daniel v. Legursky*, 465 S.E.2d 416 (1995) ("The fulcrum for any ineffective assistance of Counsel claim is the adequacy of Counsel's investigation").

The purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly inform the jury of the vital role it plays and the decision it must make. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163, 178 (1995). Therefore, it would logically follow that "[w]ithout [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." Note 20 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

It is undisputedly clear that, "the jury is the trier of facts and 'there is no presumption they are familiar with the law.'" *State v. Lindsey*, 160 W. Va. 284, 291, 233 S.E.2d 734, 739 (1977) (quoting *State v. Loveless*, 139 W. Va. 454, 469 S.E.2d 442, 450 (1954).

First-degree murder requires proof of deliberated design to kill. If one has become so grossly intoxicated, not for express preparation of the crime, as to render himself incapable of deliberation and commits a homicide, he can be guilty of no higher crime than murder in the second-degree. *State v. Keeton*, 272 S.E.2d 817 (W. Va. 1980); *State v. Kidwell*, 62 W. Va. 466 S.E. 494 (1907). See *State v. Keeton*, [*supra*], which provided:

[Syl. Pt. 2] "Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance may reduce murder in the first-degree to murder in the second-degree, as long as the specific intent did not antedate the intoxication."

The Court in *State v. Hickman*, 338 S.E.2d 188 (W. Va. 1985), held that:

"Where the testimony on an issue of fact in a criminal case is conflicting, it is for a jury to determine the weight to be attached to the reasonable inferences that can be drawn from all the facts and circumstances in evidence[.]" *State v. Magdich*, 105 W. Va. 585, 143 S.E. 348 (1928); Syllabus Point 4, *State v. Taft*, 144 W. Va. 704, 110 S.E.2d 727 (1959).

See 2 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 43 (2nd ed 1993).

See also *State v. Bush*, 191 W. Va. 8, 11, 442 S.E.2d 437, 440 (1994): Whether a defendant is so drunk that it can be said that he lacked the specific intent to commit [a crime] is a jury issue. See 2 Franklin D. Cleckley, 2011 Cumulative Supplement at 104.

In the instant case, the Petitioner had been drinking most of the day the killing of his fiancé. This fact is undisputedly clear from the evidence adduced at trial . The Petitioner presents the following facts in support thereof:

(i) Testimony of Brian Franklin Joseph:

We was drinking then Arnie went to sleep or passed out in the bed - (Tr.T., p. 108).

Q: [By Mr. Willet] What time did you wake up that morning?

A: Probably before 10:00

Q: Okay, and when you woke up did - was Arnie awake?

A: I think so.

Q: Okay. He was drinking wasn't he? He was already drinking when you woke up?

A: Yeah.

Q: Okay, what was he drinking?

A; Bud Light.

Q: did you start drinking with him at that time?

A: Not as soon as I woke up, I started drinking a little after that, but -

Q: Okay, "a little after that" would mean when?

A: I don't know, probably noon. I don't drink when I first wake up, I can't, so -

Q: Okay. Was Arnold drinking beer the entire day?

A: As far as I know.

Q: Do you remember telling the Trooper that he was - Arnie was drinking three or four beers to your one?

A: I don't know.

Q: Would that sound correct?

A: He might have been drinking a couple, but he was drinking faster that I was.

Q: You told the Trooper he was drunk.

A: Yeah. Yeah, he went in and passed out. Yeah.

Q: Okay. Did - he passed out at some point in the day you said. Because he was intoxicated?

A: Probably. (Tr. T. p.p. 119-122).

(ii) Testimony of Trooper J.D. Brewer:

Q: [By Mr. Nanners] He did give you a statement that he was drinking though?

A: Yes.

Q: [By Mr. Morris] You believe that he was drunk, under the influence of alcohol?

A: Yes, I believe he was intoxicated. (Tr. T. p.p. 158-160).

(iii) Remark by the Court:

Well, I have a concern about the first one [statement] and about his drinking and whether he was capable of making that statement at the time, because of the alcohol that he had been drinking and his condition.

Mr. Morris: Could I inquire further of the Trooper as to the alcohol issue?

The Court: You may.

Q: Trooper Morgan, how long have you been a State Police Officer?

A: Approximately three and a half years.

Q: All right, you've had opportunity to deal with intoxicated people?

A: Yes.

Q: You believe that he was drunk under the influence of alcohol?

A: Yes, I believe he was intoxicated.

Mr. Morris: I have no further testimony, your Honor. (Tr. T. p. p. 159-160).

(iv) By the Court:

Well, if he was intoxicated at the time this statement was taken, this statement is not admissible (Tr. T. p. 161).

(v) By the Court:

I ask you, do you waive the error? If he is intoxicated, then -

Mr. Nanners: Yeah, we're going to waive any error with that first statement, your Honor.

The Court: All right, then, it will be admissible then, based on your request it be admitted, and you understand that the Court would rule that it's not admissible and it would be reversible error to admit it, but you're waiving that error because you want it played.

Mr. Morris (sic): That's correct, your Honor. (Tr. T. 162).

(vi) Testimony of Charles Lynn McCartney:

Mr. Nanners: What was - was Arnie upset when you where there?

A: Yea, he was crying, he was shaking, he was kind of stuttering and he was kind of staggering. (Tr. T. p. 335).

(vii) Defense Counsel's Closing Argument:

Mr. Willet: I want to talk to you about what we know about Arnold McCartney on this morning that this happened. Arnold McCartney was intoxicated, he was drunk. He had

been drinking beer all day. The State's own witnesses have said that. Barney was talking about it, yeah, he was drinking all this beer. Intoxication was clearly proven by the evidence in this case.

You recall Brian Joseph, he started drinking beer early, when Vickie left. It was about 9:30 or 10:00 when he woke up and Arnold was already drinking. I even think he said, "He was drinking two, three, four beers to one." Kept drinking all day. Eventually he passed out about 3:00, 3:30, he was in bed. And then Vickie came home about 4:00 or so and woke him up. He started drinking again. He had been drinking all day. Even Trooper Morgan, the Trooper that charged him with first-degree murder, even he acknowledged he was drunk.

You cannot drink that much alcohol all day without being intoxicated. ... Barney also testified, as you recall, that Arnie was getting more and more drunk all day, and he fell down, fell down in the living room. (Tr. T. p.p. 393-394).

The Petitioner avers that the jury instructions were not correct, complete instructions, and "without [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." *Miller, supra.* The jury is the trier of the facts and "there is no presumption they are familiar with the law." *Lindsey, supra.*

A reasonable inference can be drawn from the fact that the jury in Petitioner's case asked for clarification of the jury instructions, previously provided to them.

The following colloquy transpired:

By the Court: I understand you all have a question?

Foreperson: Yes, we would like to have definition, written definition of the offenses charged, Murder First, Murder Two, Voluntary Manslaughter, broken down so that we can compare and

contrast, perhaps, to make sure we cover all bases.

By the Court: Well–

Foreperson: We prefer a copy.

By the Court: I can let you take the instructions back to the jury room with you. (Tr.T. p.p. 413-414).

The jury instructions given in relation to the Petitioner's intoxication defense was an incorrect statement of law, and misled and confused the jury, in the permissible ways in which the intoxication issue may have been resolved, namely, the jury was unable to draw the appropriate legal conclusion based on the facts before them. The jury instruction in which the Petitioner avers was incorrect, states as follows:

"Further, if the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of intoxication, the mind of the accused was incapable of performing or did form this specific intent to kill, or was incapable of acting maliciously, the jury should acquit the Defendant of Murder in the Second-Degree." (Tr. T. p.p. 379-380).

The proper jury instruction that should have been given should have been substantially similar to the one approved as a correct statement of law in *State v. Miller*, 184 W. Va. 492, 401 S.E.2d 237 (1990):

> "The court instructs the jury if you believe from the evidence that Johnny Miller killed Lorelei Reed as charged in the indictment, and at the time of such killing Johnny Miller was under the influence of alcohol voluntarily taken by him, then such intoxication is in law no excuse for the act done by Johnny Miller unless you believe from the evidence that such intoxication was such as did, in fact deprive him at the time of the killing the element of premeditation, in which event you can find Johnny Miller guilty of no greater offense than murder in the second-degree."

3. **Analysis**:

Under the first prong of *Strickland/Miller*, *supra*, the Petitioner must show that Defense

Counsel's performance by failing to investigate the facts and law of his case and identify the proper intoxication instruction per *State v. Keeton*, *supra*, and provide the instruction to the jury for its consideration in determining the weight of the evidence of intoxication to be attached to the facts and circumstances of the Petitioner's case, "fell below an objective standard of reasonableness" based on the situation at the time rather than on hindsight. *Strickland*, 466 U.S. at 688-90. Therefore, Defense Counsel's performance in the instant case should not be presumed to be a reasonable strategic choice[.] Id. at 690-91. Accordingly, the Petitioner has shown as a matter of law, Defense Counsel's performance fell below an objective standard of reasonableness". Id.

The second prong of the *Strickland/Miller* standard compels the Petitioner to demonstrate a "reasonable probability," or by somewhat less than a preponderance of the evidence that, but for the alleged constitutional deficiency in Defense Counsel's representation, he would have not been sentenced to life without the possibility of parole.

Ultimately, the inquiry becomes whether there is "a reasonable probability" that the jury would have found the Petitioner guilty of murder in the second-degree but for the errors of Defense Counsel. The answer to that question would be affirmative according to the two-prong *Strikland/Miller* test *supra*, because Defense Counsel's errors were so substantial as to satisfy the first prong of the test, these errors did prejudice the Petitioner in denying him a fair trial. In fact, there was a plethora of evidence adduced at trial of the Petitioner's intoxication at the time of the alleged crime, if the jury, had been provided with the correct jury instruction, there exists a 'reasonable probability' that the jury would have found him guilty of murder in the second-degree.

4. Conclusion:

Therefore, the Petitioner's conviction and sentence should be reversed and, a new trial held

in which the proper jury instructions be presented to the jury for their consideration, in order to assure a fair and just verdict, rising to the level of a 'fair dispensation of justice'.

C. Trial Counsel's and the Trial Court's failure to ask the jurors during *voir dire* if they were willing to consider recommending mercy if the Petitioner was found guilty of First-Degree Murder denied him his guaranteed Federal and State Constitutional Rights to Due Process of Law, a fair sentencing hearing, a fair and impartial jury, and the Effective Assistance of Counsel.

It is well-settled in West Virginia that, a defendant on trial for an offense carrying a possible sentence of life without parole is entitled to question individual jurors on *voir dire* to determine whether they are unalterably opposed to making a recommendation of mercy. Syl. Pt. 7, *State v. Williams*, 172 W. Va. 295, 305 S.E.2d 251 (1983). Furthermore, "a fair trial requires a meaningful and effective *voir dire* examination." *State v. Pratt*, 161 W. Va. at 537, 244 S.E.2d at 232. Petitioner had a right to adequate and meaningful *voir dire* of each juror who would fairly and impartially consider a life with mercy sentence if they found him guilty. Any juror who would not was unqualified and could have been challenged for cause.

The Petitioner further had a due process right to a fair sentencing process, especially since he had a bifurcated trial where the same jury who found him guilty of first-degree murder would ultimately determine in a penalty-phase whether they would add a recommendation of mercy to their verdict. This ... requires a jury that is free of prejudice regarding the sentence. *Williams*, 172 W. Va. at 307, 305 S.E.2d at 263. It is axiomatic that "the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial indifferent jurors."

Because the Petitioner was facing a possible sentence of life without parole for first-degree murder, the harshest sentence that can be meted out in this state, it was objectively unreasonable for both his Counsel and the Court to fail to determine whether each juror was willing to consider a

recommendation of mercy. Therefore, Trial Counsel rendered deficient performance, thus resulting in prejudice, due to a "reasonable probability" that there were jurors on the panel, who were unalterably opposed to recommending mercy.

Accordingly, just as counsel has a duty to advocate for his client at sentencing, *Mempa v. Rhay*, 389 U.S. 128, 135, 88 S. Ct. 254, 257 (1967), counsel has a duty to ensure the sentencing process will be fair and the jurors who will determine the sentence will follow the law. It is no secret there are jurors who believe that anyone convicted of first-degree murder should not be given any mercy and therefore would not consider recommending mercy. The risk that such juror or jurors may have been sitting on the Petitioner's jury is too great and, if so, could easily been determined by Trial Counsel, who had a clear duty to make this necessary inquiry. Because the magnitude of the difference between a life sentence without parole in contrast to a life sentence with parole eligibility after fifteen years, which the Petitioner faced, it was objectively unreasonable for counsel not to determine that each juror would consider recommending mercy if they found him guilty.

The Petitioner was prejudiced by Trial Counsel's and the Trial Court's failure to ensure the jury was *voir dired* on the issue of mercy. The prejudice was further compounded when the State told the jury in its closing argument, "nothing will bring Vickie back" that's true. But letting a murderer go "invites a repeat of the same crime." (Tr. T. at 408). Counsel's and the Trial Court's failure to ensure the jury would fairly and impartially consider the issue of mercy denied the Petitioner his rights to due process, a fair and impartial jury and a fair sentencing process. Therefore, the Petitioner was denied his State and Federal rights to the effective assistance of counsel. Syl. Pt. 5, *Miller, supra, Strickland, supra.*

D. Petitioner's right to not be compelled to be a witness against himself was contravened

by Trooper Morgan under the totality of the circumstances, in violation of his due process rights as guaranteed to him through the Fifth Amendment of the Constitution of the United States, applicable to the States through the Fourteenth Amendment, and Article III, § 10 of the West Virginia Constitution, respectively.

The Supreme Court of the United States in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), held: the Constitution protects an accused criminal defendant against government coercion, purely voluntary statements are not subject to *Miranda* safeguards. Nevertheless, whether or not *Miranda* is implicated, a confession must be voluntary to be valid; thus a confession may be deemed coerced even after *Miranda* warnings have been given. To determine the voluntariness of a confession, a court must inquire whether, considering the totality of the circumstances, law enforcement officials have overborne the will of the accused. The factual inquiry centers on (1) the conduct of law enforcement officials creating pressure and (2) the suspect's capacity to resist that pressure. Id.

Accordingly, pursuant to the Fifth Amendment, no person shall be compelled in any criminal case to be a witness against himself without due process of law. A statement of an accused, however, is involuntary under the Fifth Amendment only if it is involuntary within the meaning of the Due Process Clause. Whether a statement is voluntary is determined according to the totality of the circumstances, including the characteristics of the defendant, the setting of the interview, and details of the interrogation.

Under the totality of the circumstances, a statement is involuntary if the accused's will was overborne or his capacity for self-determination critically impaired. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the Due Process Clause. *United States v. Gatherum*, 2008 U.S. Dist. LEXIS 5268 (S.D. W. Va. 2008). Accord, *State ex rel.*,

Bess v. Legursky, 195 W. Va. 435, 436 S.E.2d 892 (1995) (the determination of voluntariness of a confession must be premised upon the circumstances, both the characteristics of the accused and details of the interrogation).

The Petitioner avers that "under the totality of the circumstances" of the particulars of his case, this Honorable Court, as a matter of law, should find that his will was overborne and his limited capacity for self-determination was critically impaired. The Petitioner possesses low-intelligence that required he attend special education classes throughout his formative school years, suffered a traumatic brain injury when he was very young that required emergency surgery by a specialized doctor to remove a rock from his forehead that had penetrated his brain tissue, he was still intoxicated and had not slept the night before Trooper Morgan questioned him at the Central Regional Jail, and was under a suicide watch wearing a suicide prevention suit.

OFFICER: All right, I'm just going to read everything to you. The same thing I did last night, all right? Like I said, you are under arrest for the crime of murder and that's what you're being questioned for. Your rights are, before we ask you any questions, you must understand your rights and you have the right to remain silent, anything you say can and will be used against you in Court and you have the right to talk to a lawyer for advice before we ask you any questions and to have him or her with you during questioning. If you are under arrest and cannot afford a lawyer, the Court will appoint one for you before any questioning, at your request. If you decide to answer the questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to your lawyer. You still understand those rights?

DEFENDANT: Mm-hmm. (Affirmative answer).

See Trial Transcript at p. 232.

OFFICER: ... All right, now, right down here you want to sign, " I have had this statement of my rights read to me and I understand them. I do not want a lawyer at this time. I understand what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me in connection with this interview. I agree to be interviewed, answer questions

and make a statement." If you agree to that, I just need you to sign there at the "x" for me and I'll date it and time it, all right?

DEFENDANT: I don't know whether to talk to a lawyer or not.

OFFICER: Like I said, that's up to you, I mean, you talked to me last night and you're good with me[.]

DEFENDANT: What's that mean?

See Trial Transcripts at p. 233.

The Supreme Court of the United States in *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 350, 129 L.Ed.2d (1994), held: "... invocations of the Sixth Amendment right to counsel requires that the suspect 'articulate his desire to have counsel present sufficiently clearly that a reasonable Police Officer in the circumstances would understand the statement to be a request for an attorney.'"

The analytical framework is clear: if the defendant "indicated in any manner, at anytime prior to or during questioning, that he wished to remain silent," [and talk to a lawyer], the Police were to stop interrogating him. *Miranda v. Arizona, supra.* The Petitioner posits that if his statement was sufficient to cease the interrogation, his subsequent confession could not be admitted at trial unless "his right to cut off questioning was 'scrupulously honored.'" *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975) (quoting *Miranda*, 384 U.S. at 474, 479).

Therefore, a reasonable police officer under the above circumstances would have understood the defendant's statement to mean he no longer wished to answer questions involving the alleged crime against his girlfriend, and, therefore, the officer should have stopped asking him questions. The defendant's statement was "sufficiently pellucid" enough to invoke his invocation to silence.

The Petitioner, as a matter of law, has demonstrated that his invocation was clear and

unambiguous enough to satisfy the strictures of *Davis*, *supra*.

E. The cumulative errors that occurred at the Petitioner's trial for First-Degree Murder requires a reversal of his conviction of First-Degree Murder without the Possibility of Parole.

The constitutional errors as set forth above, prevented the Petitioner from receiving a fair trial in contravention of his State and Federal rights to Due Process of the law.

In Syl. Pt. 5 of *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972), the WVSCA held that: "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error."

The Petitioner avers that none of the errors as set forth above could be found to be harmless, according to the proper application of the appropriate standards of review. In fact, any one of these constitutional errors standing alone warrants a reversal of his conviction and sentence.

III. PRAYER FOR RELIEF.

The Petitioner forevermore prays that this Honorable Court grant his Writ of Habeas Corpus and release him from custody, or grant any other relief the Court deems necessary in the interest of the fair dispensation of justice.

IV. VERIFICATION.

I, Petitioner herein, Arnold McCartney, doth hereby (declare, state, and/or affirm) under the penalty of perjury that the attested facts and statements contained herein are true and correct to the best of my knowledge and belief. As to those statements based upon information of others, of facts represented by others or founded upon their testimonies, I believe the same to be true and correct. It is so Sworn.

Respectfully Sworn and Attested

Date: _____

Arnold McCartney

Arnold McCartney, *Pro Se.*
Mount Olive Correctional Complex
One Mountainside Way
Mt. Olive, WV 25185

EXHIBIT - 1

I'm now going to send you back to your jury room to continue your deliberation. All the exhibits will be brought back to you and those instructions are in there, too that you asked for yesterday, and the Bailiff has set up a –

BAILIFF: CD player.

BY THE COURT: A CD player for you, so that you all can play those two CDs, that you indicated you wanted to listen to today.

So you may now return to your jury room and continue your deliberation.

WHEREUPON, at 9:24 a.m., the jury retired to the jury room to continue their deliberations.

BY THE COURT: We will stand in recess until we hear from the jury.

WHEREUPON, at 9:24 a.m., a recess was taken.

February 18, 2010
11:27 a.m.

BY THE COURT: Case of State of West Virginia versus Arnold Wayne McCartney, 09-F-08.

He's personally present, with his attorneys, Steven Nanners and Dennis Willett.

The State's represented by Gary Morris, Prosecuting Attorney.

It's 11:23 and I'm advised by the Bailiff that the jury is ready to report. Bring the jury in, please.

WHEREUPON, the following proceedings were held in the presence of the jury, to-wit:

BY THE COURT: Let the record show all members of the jury panel have returned to the Courtroom.

Mr. Foreman –

FOREMAN: Yes, sir?

BY THE COURT: Has the jury reached a verdict in this case?

FOREMAN: Yes, sir, we have.

BY THE COURT: Did all 12 members of the jury agree to that verdict?

FOREMAN: Yes, sir, they have.

BY THE COURT: And did you sign the form of verdict?

FOREMAN: Yes, sir.

BY THE COURT: Would you pass it to the Bailiff, please? Have a seat. The Clerk will read the verdict.

CLERK: Ladies and gentlemen, harken to the verdict as reported by your Foreperson: "The State of West Virginia versus Arnold Wayne McCartney, Form of Verdict. We, the jury, find the Defendant, Arnold Wayne McCartney, guilty of the offense of Murder in the First Degree, a felony, as charged in the first count of the

indictment. Dated February the 18th, 2010. Signed, Foreperson, Jonathan D. Chapman." So say all 12 of you, ladies and gentlemen?

BY THE COURT: All right. The verdict of the jury is received by the Court, filed and made a part of the record in this case.

Now, ladies and gentlemen, I explained a little something to you awhile ago, but now, listen to this further instruction. You've not completed your work yet.

Ladies and gentlemen of the jury, you have decided the guilt of the Defendant and have found the Defendant guilty of Murder in the First Degree. Under the laws of the State of West Virginia, the Defendant, having been found guilty of Murder in the First Degree, the Court must sentence him to confinement in the penitentiary for life and he shall not be eligible for parole unless you, in your discretion, further find and add to your verdict a recommendation for mercy. That recommendation of mercy would mean that the Defendant, Arnold Wayne McCartney, could be eligible for parole consideration, after having served a minimum of 15 years.

Now, the parties will now present to you, for your consideration, additional evidence, in addition to that evidence that you have previously heard in this case, which you may consider in arriving at your decision, which is your sole discretion as to whether or not to recommend mercy as to the charge of First Degree Murder.

Your decision as to whether or not to recommend mercy is in your sole discretion and finally, your decision as to whether or not to recommend mercy in

this case, as in all others, must be unanimous. That is to say, you must all agree upon the decision that is reached.

Now, does the State have anything to present with regard to whether or not the Defendant – mercy should be recommended?

MR. MORRIS: May we approach the Bench, Your Honor?

BY THE COURT: You may.

(At the Bench.)

MR. MORRIS: I'll present the mother and father of the victim if that's proper. I –

BY THE COURT: Yes.

MR. MORRIS: Okay, that would be the – that's what we'll do then. I'll just ask them some brief questions and let them speak.

BY THE COURT: All right.

(End of Bench Conference.)

MR. MORRIS: Your Honor, we'll have just one witness.

BY THE COURT: Bring your witness forward.

Come around and have a seat, please.

MR. NANNERS: May we approach, Your Honor?

(At the Bench.)

MR. NANNERS: We would object to this witness. This witness was not named in the jury selection process. It's not been involved with the –

BY THE COURT: This is a different issue.

MR. MORRIS: There's a picture, too.

MR. NANNERS: Judge, the case law in this, in this mercy phase, is the same, there's no lessening of the rules of evidence, everything that applies in a regular trial applies at the mercy stage, and this has not been a witness that's been disclosed, nor has it been a witness who's been named as a potential witness in the trial of the case.

MR. MORRIS: That's true, you know, I mean, I have to say, I did not disclose –

BY THE COURT: Well, I know that, but I'm not sure that that applies when it comes to this part of the case.

MR. NANNERS: All I know is the case law says that everything applies during the mercy stage that during the trial of the case.

BY THE COURT: All right. Let's take a recess.

(End of Bench Conference.)

BY THE COURT: Ladies and gentlemen, I'll ask you to go to your jury room for a few moments, please.

WHEREUPON, the following proceedings were held out of the hearing and presence of the jury, to-wit:

BY THE COURT: You may step down.

Let's see your case law that you're referring to.

WHEREUPON, at 11:35 a.m., a recess was taken.

February 18, 2010
11:51 a.m.

BY THE COURT: We're back in open Court in the case of State versus Arnold Wayne McCartney, 09-F-08.

He's present with his attorneys, Steven Nanners and Dennis Willett.

The State's represented by Gary Morris, Prosecuting Attorney.

We've been in chambers discussing and researching the law with regard to the admissibility of certain testimony in the bifurcation stage of these proceedings, after the Defendant having been found guilty of Murder in the First Degree.

I have been informed by the Prosecuting Attorney that he's not going to put on any witnesses. Is that right, Mr. Morris?

MR. MORRIS: That is right, Your Honor, we're not putting any evidence in.

BY THE COURT: How about the Defendant?

MR. WILLETT: Your Honor, we intend to call Arnold McCartney.

BY THE COURT: Bring on (sic) the jury, please.

WHEREUPON, the following proceedings were held in the hearing and presence of the jury, to-wit:

BY THE COURT: Let the record show that all members of the jury panel have returned to the Courtroom.

Call your first witness.

MR. WILLETT: I call Arnold Wayne McCartney, Your Honor.

BY THE COURT: Hold up your right hand and be sworn, Mr. McCartney.

Come around and have a seat, please. Proceed.

MR. WILLETT: Thank you, Your Honor.

WHEREUPON, ARNOLD WAYNE MCCARTNEY, having been first duly sworn, was called upon as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLETT:

Q State your name, please.

A Arnold Wayne McCartney.

Q And Arnold, I want to take you back to December 20th, 2008, the day that Vickie died. How long had you been with Vickie?

A About five years.

Q Okay, you had a child together?

A Yes.

Q How old – when was your child born?

A He was born in August.

Q In August, 2008?

A Yeah.

Q Okay. You lived down there on Millstone Road with Vickie.

A Yes, sir.

Q Is that the only place that you had lived with her?

A Yes.

Q Now, you had been with her for five years. Tell us – tell the jury about your relationship with Vickie.

A Well, she was the best thing that ever happened to me. I mean – she was my world, I mean, it was – she was everything that I had, besides my kids, though.

Q Were you planning to get married?

A Yes, we were going to get married that coming up summer, when that happened.

Q Now, on the 20th, you stated to the Trooper following this – that evening, the next day, that you had been drinking pretty heavily, correct?

A Yes.

Q Okay, did you drink a lot?

A Yeah.

Q Before that week, did you drink a lot other days?

A Some days.

Q Some days? Where were you employed at that time?

A For Rick Kincaid Logging.

Q Okay and you had been working there how long?

A About a year.

Q So you plan on getting married the next summer.

A Yeah.

Q You just had a baby. And when this happened, you heard your statement to the officer that you did what as soon as the gun went off?

A I just dropped it and picked her up and started holding her and told her I loved her and kissed her.

Q You went down to – you were seen later, you had blood on you. Was that from holding her?

A Yes.

Q Did you try to revive her or anything?

A I don't know. That was kind of that – I blacked out, you know, and just – the shot and stuff, I mean. I don't know, I just went hysterical.

Q Okay. When you had that gun, why – you told the Troopers you intended to scare her. Why did you intend to scare her?

A Here I thought she was cheating on me with Brian and you know, into drugs and stuff and I just figured, you know, you know, it would scare her, you know and if she was, she wouldn't do it no more. You know, she was just fooling around with him.

Q Did you feel that you were losing your fiancée?

A Yes.

Q Okay.

A Like I said, she was everything, I mean, she's the one that I loved.

Q Okay. Picking up that gun, do you remember what was in your mind when you picked up that gun?

A I was losing my wife and I thought, you know, she was cheating on me, and I just picked it up, you know, to scare her. You know, maybe if she was cheating on me, she wouldn't do it no more.

Q Did you intend to kill her?

A No. No. That's the reason I didn't fool with that shotgun, cause I knowed it was loaded. I didn't want to shoot her.

Q Do you recall talking to Trooper Morgan the night that this happened?

A Yeah.

Q And you told him what – best as you could recollect, what went on, correct?

A Yes.

Q And you didn't try to hide anything from him?

A No.

Q And you talked to him the next day when you were down at the Regional Jail, correct?

A Yes.

Q You knew you could have a lawyer, you knew you didn't have to talk, but you went ahead and gave him your statement, correct?

A Yeah, I told him what happened, I mean, I told him the truth about it and there's no doubt, you know, Brian and them, I mean, they're lying about it, the dope and stuff was there, but I told you the truth and now I'm the one that's paying. You know, I lost my wife, my kids. The only thing that I had was her.

Q Are you asking this jury to extend you mercy?

A Yes. Yes, I would ask that they give me mercy.

MR. WILLETT: That's all the questions I have, Your Honor.

BY THE COURT: Mr. Morris?

MR. MORRIS: I just have one question for Mr. McCartney.

CROSS EXAMINATION

BY MR. MORRIS:

Q Arnold, why didn't you think about your son, your baby, when you were doing all this?

A Sir, I had a lot to drink that night and I just snapped, I mean, I thought I was losing my wife and, you know, and she was the love of my life, you know,

and I didn't mean for anybody to get hurt. It was just a stupid mistake and that is all it was.

MR. MORRIS: I don't have any further questions.

WITNESS: I'm going to tell you something else. I would have rather – when the gun went off, I would have rather that it shot me than her.

BY THE COURT: You may step down.

WHEREUPON, the witness stepped aside.

✓ BY THE COURT: Do you have any other witnesses?

✓ MR. WILLETT: No further witnesses, Your Honor.

✓ BY THE COURT: Now, I've not excluded any witnesses, you understand ✳ that?

✓ MR. WILLETT: Yes, sir, we have no further witnesses.

✓ BY THE COURT: Again, I say for the record, I have not excluded you on ✳ any other witnesses. You can bring them on if you want to.

MR. WILLETT: I understand, Your Honor. May we have just a minute? Nothing further, Your Honor.

BY THE COURT: All right, ladies and gentlemen, you'll now return to your jury room. I'm going to give you this supplemental charge for you to read in case there's any question about it, it's one of the instructions, and this form of verdict that all 12 of you must agree on, if you can.

And it says, "We, the jury, do recommend mercy for the Defendant, Arnold Wayne McCartney." If that is your recommendation, then the Foreperson would sign it and date it. A recommendation of mercy means that he'll be sentenced to the penitentiary for life, but he will eligible for parole in 15 years.

The next one is, "We do not recommend mercy." That means that if you find that one, that he will be sent to the penitentiary for the rest of his life, period.

MR. WILLETT: Your Honor, before the jury goes out, I'd ask the Court to instruct the jury that eligibility for parole in 15 years does not mean that he gets parole in 15 years.

BY THE COURT: I said "eligible" for parole, I didn't say that he gets it, I said, "eligible".

MR. WILLETT: Yes, sir.

BY THE COURT: There you go. You may go back to your jury room, please.

WHEREUPON, at 12:01 p.m., the jury retired to their jury room to commence deliberation on the issue of mercy for the Defendant.

WHEREUPON, at 12:01 p.m., a recess was taken.

February 18, 2010
12:13 p.m.

BY THE COURT: State versus Arnold Wayne McCartney, 09-F-08.

The Defendant and his two attorneys, Mr. Willett and Mr. Nanners, are all present, and the Prosecutor is present and I understand from the Bailiff the jury is ready to report.

Bring the jury in, please.

WHEREUPON, the following proceedings were had in the hearing and presence of the jury, to-wit:

BY THE COURT: Let the record show all members of the jury panel have returned to the Courtroom.

Mr. Foreman, has the jury completed their work and reached a verdict with regard to this issue of mercy?

FOREPERSON: Yes, sir, we have.

BY THE COURT: And did all 12 members of the jury agree to it?

FOREPERSON: Yes, sir, they did.

BY THE COURT: Did you sign the verdict?

FOREPERSON: Yes, sir.

BY THE COURT: Would you hand it to the Bailiff, please?

The Clerk will read the verdict.

CLERK: Ladies and gentlemen, harken to your verdict as reported by your Foreperson: "State of West Virginia versus Arnold Wayne McCartney. Form of

Verdict: We, the jury, do not recommend mercy for the Defendant, Arnold Wayne McCartney. Signed, February the 18th, 2010, by Foreperson, Jonathan D. Chapman." So say all 12 of you, ladies and gentlemen?

BY THE COURT: The verdict of the jury is received by the Court, filed and made a part of the record in this case.

The Defendant now stands convicted of First Degree Murder, without a recommendation of mercy.

Ladies and gentlemen, I do want to thank you all for your services in this case. I know it's been a long two and a half days and a very tiring case. I'm not going to make any speeches, I'm just going to excuse you now. Are any of you still on the Crane case that's set for next Tuesday, any of you on that case? It's still on, as far as I know.

The one that's set for next Thursday, the Payne case, now as far as I know at this time, it's still on, but be sure and call in, okay? All of you be sure and call in the day before.

You're now excused and free to go and everybody in the Courtroom will remain seated until the jury has cleared the Courtroom and I have excused you. You're excused.

WHEREUPON, the jury panel was excused.

BY THE COURT: Now, as counsel knows, in a case of a First Degree Murder conviction, the Court has no discretion with regard to sentencing. It's fixed,

by law, and the sentence in this case would be life imprisonment without the possibility of parole. Do you want to go ahead and sentence now or do you want to do it later? I'll give you your choice. I see no reason for a presentence investigation.

MR. WILLETT: I don't see anything, Your Honor, that would warrant putting this off. It's statutory.

BY THE COURT: All right. Hold on just a moment there.

WHEREUPON, at 12:17 p.m., a brief recess was taken.

February 18, 2010
12:18 p.m.

BY THE COURT: The record may show that on this, the 18th day of February, 2010, comes on for further proceedings before the Court, Criminal Action Number 09-F-08, styled State of West Virginia versus Arnold Wayne McCartney.

The Defendant, Arnold Wayne McCartney, is present, in person, and is accompanied by his attorneys, Steven Nanners and Dennis Willett.

The State's represented by Gary Morris, Prosecuting Attorney for Lewis County.

Mr. McCartney, on this, the 18th day of February, 2010, you were found guilty by a jury and are now adjudged convicted of the offense of First Degree

Murder, that being the offense charged in the indictment in this case. The jury did not recommend mercy. The case was bifurcated for the purpose of deciding that, and the jury came back with that verdict.

Your conviction of this offense is based upon your trial by a jury and you having been found guilty.

The verdict of the jury had been received and is ordered recorded in this case.

Now, what about motions for a new trial?

MR. WILLETT: We certainly anticipate on filing those. I don't know that would affect whether or not we sentence. I'd leave it to the discretion of the Court.

BY THE COURT: Well, I believe those should be heard before we sentence him.

MR. WILLETT: That is fine, Judge.

BY THE COURT: I just – it slipped my mind. I just think we need to do that. That's the proper procedure.

MR. WILLETT: That would be fine with us.

BY THE COURT: So I'm going to remand him to the custody of the Sheriff and set this for a motion day. Would you get my calendar off my desk, please? I'm forgetting everything.

How much time do you need?

MR. WILLETT: Your Honor, we're going to – I think part of our post-trial

motions, we're going to ask for transcripts to be prepared of the proceedings here so we can prepare for the motions.

BY THE COURT: Oh, I don't think we need to do that.

MR. WILLETT: I'd ask for 30 days.

BY THE COURT: Well, that's certainly reasonable. How about the 18th day of March, at 1:00 o'clock? At 1:00.

MR. WILLETT: Your Honor, I have a trial in Webster Springs on the 17th, that I'm anticipating going –

BY THE COURT: You think it will go over on into the next day?

MR. WILLETT: It could, very well.

BY THE COURT: How about the 7th of April?

MR. WILLETT: That's fine, Judge.

BY THE COURT: Mr. Morris?

MR. MORRIS: Judge, I'll be here.

BY THE COURT: All right. We'll set it for – well, 9:00 o'clock on April the 7th. And at that time, I'll hear any post-trial motions that you have to make.

MR. WILLETT: Yes, sir.

BY THE COURT: All right. I think that's the procedure we need to follow, instead of sentencing him today.

BY THE COURT: Sir?

MR. MORRIS: Yes, sir.

BY THE COURT: All right. He's remanded to the custody of the Sheriff.

He's not been under – there's been no bond for him, so he's remanded to the custody of the Sheriff pending further proceedings herein. Here you go. Court's adjourned.

WHEREUPON, Court was adjourned at 12:22 p.m.

CERTIFICATE

I hereby certify that the transcript within meets the requirements of the Code of the State of West Virginia, 51-7-4 and all rules pertaining thereto as promulgated by the Supreme Court of Appeals of the State of West Virginia.

Entered this 15th day of March, 2010.

Jeannie L. Hyre, Court Reporter

EXHIBIT - 2

Oct 20, 2012

To whom it may Concern,

My name is Vernita J. McCartney, I'm the Mother of Arnold Wayne McCartney, when Arnold, was about 7 or 8 years old, he wrecked his bicycle and ran a gravel rock the size of your Little finger, in his forehead. And it tore the Lining tissue of the brain, and it was draining out some Fluid off of the brain. The Doctors had to do Surgery on him, to repair the Lining. And it took 22 staples stitches, in his fore head. He still Carries the Scar. After all this happened, Arnold, has always been a little short tempered. All through his School years, Arnold, had to be in a slow learning class, because he had a learning disability. It was hard for him to do a lot of his work and keep up with the other students. But, he always Seemed to get along real good with everyone, and never had any problems with anyone, I mean, No fighting, or arguing, or any thing like that. His teachers always told me at parent teachers meeting, how well they liked Arnold, and how much they enjoyed his stories,

that he always told them. I feel that his Lawyers, should have brought in out Side Doctors, to give Arnold, a psychoiogical evaluation. I raised this man up from a little baby and I know deep down in my heart, that he is not a murderer. And I know in my heart that Arnold, Love'd Vicki, very, very much, he always Called her Honey this, and Honey that, or Baby this and Baby that. And there had to be some thing that triggered this terrible, terrible accident to happen. Because I remember once Vicki, took an over dose of pills and Arnold, Came home from work in time to Call 911 for help and Saved her Life. Since this terrible tragic accident happened, its been hard on everyone, and my heart goes out to the Pages, for the loss of their daughter. And its been hard on my Grandson's too. They are not allowed to See their dad, and I dont feel, its right, Because he's still their dad, and he has the right to see his sons. Also, I dont feel deep in my heart that Arnold, got a fair Sentencing trial. Even before

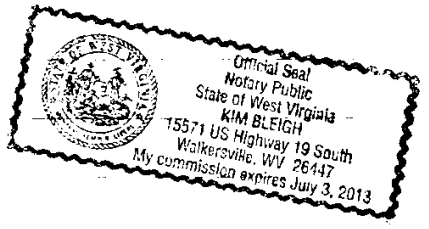
Arnold, went to trial he told me that he didn't Kill Vicki, on purpose, and he Couldn't Sleep and was tormented by what happened. Arnold, told me that he knew he had a drinking problem and a anger issue when he drank, So he's going to go to classes while he was in jail to get some help. I don't feel Life with out mercy and no parole, Was fair for my Son, when other deliberate does the Same thing and they get mercy and parole. I feel Arnold, Should at least gotten mercy and parole. when this unexpected and tragic accident happen. My son, Arnold, didn't try to run or hide or any thing, he stayed and faced up to what happen and the Sentence he got was un fair. I feel he should have gotten mercy

(over)

and parole. From a mother who Loves and Cares For her son, very, very, much. I Just hope and pray to God in Heaven, that the Legal System give my son a new trial and he can get a second chance in Life, at least mercy and parole.

phone - 452-8235

Verinda J. McCartney



My commission expires July 3, 2013

Kim Bleigh

Oct 11, 2012

My Name is Virginia Pearl Jordan. I'm the Grandmother of Arnold Wayne McCartney. I'm Blind, and handy Cap'd and in a wheel chair. Out of all my 10 Grand Childrens Arnold, is the only Grand child that had a heart and Loved and Cared enought to come and get me and take me on Camping and fishing trips and bring me back home. Arnold, and Vickie, Took me several times with them. Arnold is the only one that Took the time to be bother With a blind, clipped up, handy cap'd Lady. All the times that I have been with Arnold and Vickie, I have not heard no harses words between or no violnce or anger or hateful words between them. They always seam happy, jolly, . We all enjoy our trips together, and enjoy ourselves. And for me being blind, handy cap'd, and had to be waited on hand and foot, Vickie, didn't seam to mind it one bit, She Was as good to me as any one Could be. Arnold and Vickie Laughted and Joked around all the time they seam to really be happy and enjoy being togther. And it was really great to hear them Laught and Joke around togethe. All so I've been to Arnold, home many, many times, since him and Vickie, been togther, they always seam happy and getting along great. They were both really excided and happy, when they found out they were going to have a baby together, they were both as proud as they Could be. not mending Arnold was happy, and proud over his other two sons, he Love's them very, very much, also like the cockatts, Arnold, or Vickie one would always come and get me and take me back home.

over

arnold, seam like he always wanted me there, to enjoy it with them. Since this terrible, terrible accident happen. I have not gotten to go on any more camping trips or cookout. Arnold, was always there when I needed him, day or night. He was always ready to help out in any way he could. I don't feel deep down in my heart that arnold got a fair trial, they all seam to be again him from the start. Also I don't feel that arnold should have gotten Life without mercy and no parole. I feel he should at least gotten mercy and parole. I hope and pray that the Legal System will grant him a nother trial and something good come out of it for Arnold. So he can maybe come home and be with me and he can get to see his sons, and his Love ones. Since all this happen he has not been allowed to see his boys, and I for one don't feel this is right, He Should have the right to see his boys.

Virginia P Jordan
phone-304-452-9806

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
[illegible] US Highway 19 South
[illegible], WV 26447
My commission expires July 3, 2013

My commission expires July 3, 2013
Kim Bleigh

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
15571 US Highway 19 South
Walkersville, WV 26447
My commission expires July 3, 2013

My commission July 3, 2013
Kim Bleigh

Oct. 12, 2012

I have known Arnold McCartney since I taught him in Third Grade.

He was always very polite and good natured. He always had a smile, and got along well with his classmates and I.

One day he came to school crying. I immediately asked him what was wrong. He said that his cow died last night. This is just one example of how kind hearted he is.

Years later, I had his two sons in my class. He was so proud of them both and showed them lots of love.

He always came to Parent Teacher Conferences. At one conference, he cried as he told me about his oldest child being beaten while he was at his Mom's house.

I was always touched by how much his sons loved him. They always shared stories about the fun they had with him.

I have lived in the same community with Arnold, and never heard of him hurting others.

phone- 452-8407

Sincerely,
Mrs. Sharon Spaur

To Whom It May Concern,

I have been a Teacher in Lewis County Public School System for several years. I had the pleasure of working with a very nice young man by the name of Mr. Arnold McCartney. Arnold was a joy to work with in school. I never saw him act nasty unkind or treat anyone in a negative way. He has never to my knowledge been in fights at school. He is a person who would go out of his way to be kind and helpful to anyone. He cares about his family and his friends.

It is my hope and prayers that Arnold be given a second chance in life. I hope that legal system would give him a fair trial. If you should have any questions please feel free to contact me at my home phone number. 304-452-9425

Sincerely Yours,

Mrs. Cathy Posey Erler

Mrs. Cathy Posey Erler

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
15571 US Highway 19 South
Walkersville, WV 26447
My commission expires July 3, 2013

My commission expires July 3, 2013
Kim Bleigh

Rera Starkey
78 Depot Road
Crawford, WV 26343
phone - 452 - 9921

My commission expires July 3, 2013
Kim Bleigh

To Whom It May Concern,

I am writing this letter to plea to the Courts in the matter of State of WV vs. Arnold McCartney, who is being held on Life without parole for charges of first degree murder. I have known, personally, this man, since he was 4 years old. I am, Rera Starkey, a neighbor in the same small community and a Lewis County Citizen concerned that the extreme sentence imposed is, in my belief, a complete injustice, in this matter.

Arnold McCartney, whom I always knew, as "Arnie", was always a very gentle + decent man. I have known him for so many years. In all of the many times I interacted with him I honestly never once witnessed Arnie showing any temper. Arnie was always happy and "light-hearted" everywhere he went. Never once, did he pose himself as a disreption, or threat to anyone or anything.

Arnold McCartney is one of the few members in this small community that voluntarily would step up and offer his help to his neighbors. He expected nothing, and asked for nothing - he simply helped because this was "his nature", and it was just "the right thing to do." For one example, there was a terrible flood that demolished

our area and I was "housing" a family in my home, who lost everything in the flood. Arnie McCartney, numerous times showed up at our door step, bringing produce + necessities to aid my friend + her children. He went over + above the duties of a "Concerned neighbor", and was unquestionably one of the shining examples of genuine human care during this community tragedy.

I was absolutely appauled to hear about the occurance which Arnie is now imprisoned for. My heart sincerely goes out to Vicky's family & children, as well as Arnie, in the matter of Vickie's unexpected + tragic death!! This still is hard for me to comprehend! I have so very many times seen Arnie + Vicky together, both privately + in public settings, and he + they were both so very much in love! I know in my heart Arnie would never, maliciously, set out to hurt that woman. She + his kids, was his entire world! I know that there must be other extenuating circumstances involved that lead to the terrible + tragic accident that took Vickys life. I also know, that it too, took Arnie's life + heart as well.

I am pleading to the mercy of this Court and those with powers that be, to reconsider the sentence imposed upon this man. If ever there was a time for "Mercy" in the eyes of the Court, it is this one. Please do right in the name of Justice + reduce the sentence ordered in this matter. A good man, loving father, hard worker + positive member of my community needs + deserves reconsideration.

Thank You for your time + compassion, Sincerly, Brad Starkey

oct 15, 2012

I Charlie Chipps. Live in Walkersville, Lewis Co, W.Va I have known Arnold McCartney for years and never seen or known of him being hateful or Violence in any way. I never known of Arnold pulling a Knife or Gun on any one. He was always ready to help out in any way he Could. He seem like he always got along with every one. Also Arnold has worked for me and my brother Terry, Cutting Timber For us.

phone 452-8530

Charles S Chipps
304 452 8530

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
15571 US Highway 19 South
Walkersville, WV 26447
My commission expires July 3, 2013

My commission expires July 3, 2013
Kim Bleigh

Oct 15, 2012

I John Hedrick have known Arnold Mc Carnety for twenty five yrs. I have never seen him mistreat any one. He was always Good to me. When him and his Woman was around it was always Babe this + Babe that. the last time I seen him he was at my Place. With Vickie & their Child. Arnold was Proud of her & Child as Proud could be.

I have known him for many yrs. he was a hard Worker and I have never seen any wrong doing out of him

John A. Hedrick
Phone - 452-8831

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
15571 US Highway 19 South
Walkersville, WV 26447
My commission expires July 3, 2013

my commission expires July 3, 2013
Kim Bleigh

I, Mary Gregory owned and operated the Minuteman Store in Walkersville, Wv for 13 years. At that time I got acquainted with Arnold McCartney. He was a nice and polite young man. He usually was joking and laughing but not causing any trouble. I never saw any violence from Arnold at my place of business. After selling my store in May 2006, I had no contact with Arnold McCartney.

Mary Gregory
Oct. 18, 2012

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
[illegible] US Highway 19 South
[illegible], WV 26447
[illegible] expires July 3, 2013

my commission expires July 3, 2013
Kim Bleigh

To whom It May Concern 10-22-2012

I am the Sister of Arnold Wayne McCartney. I Love my brother dearly. I don't understand why my brother got Life in Prison without Mercy. I don't believe my brother got a fair trial in Court in Lewis County. When the most horrible tragedy happened, my brother Lost his Love, mother of his Child Ms. Vicky Paige. When the horribe Scene happened Arnold did not run, he stayed. My brother is a Kind-Loveing Soft hearted person. He will try his best to help those in need if they ask or need him to. Once Ms. Paige took an overdose of Pills, Arnold Came home and found her, he got help, 911 Came and took Ms. Paige to the Hospital. Medical Records for proof, should be at Hospital. Ms. Paige was liveing with Arnold at that time.

My brother Is NOT A MURDER, and I would not write or Say Such a thing if it wasn't true. God Says if you Can't forgive How Can God forgive you"? We all make mistakes, its human but I believe in Mercy and forgiveness, and Second Chances. Some people Runs from What they had done, Not Arnold.

written By A Sister True Love,

x Pamela Lane

My commission expire July 3 2013
Kim Bleigh

Official Seal
Notary Public
State of West Virginia
KIM BLEIGH
15571 US Highway 19 South
Walkersville, WV 26447
My commission expires July 3, 2013

1144 Abrams Run Rd.
Walkersville, WVa
26447

To Whom it may Concern:

My name is Brenda Hall, I have been contacted by Jane McCartney, Mother of Arnold McCartney. She requested me to write a letter on behalf of Arnold.

I have known Arnold since his early teens. I have never seen Arnold have any violent tendencies. He was always laughing and joking.

Brenda Hall
October 10, 2012

State of West Virginia
County of Lewis

Before me this 10th day October 2012 Brenda Hall

Acknowledged

OFFICIAL SEAL
STATE OF WEST VIRGINIA
NOTARY PUBLIC
SHARREY A. CRAIG
595 Big Run Road
Walkersville, WV 26447
My commission expires April 7, 2013

Sharrey A Craig

My commission expires April 7, 2013

EXHIBIT - 3

CERTIFICATE OF BAPTISM

THIS IS TO CERTIFY THAT

ARNOLD McCARTNEY

WHOSE HOME ADDRESS

CRAWFORD, WEST VIRGINIA

WAS BURIED WITH CHRIST IN BAPTISM

ON THE THIRD DAY OF MARCH

IN THE YEAR TWO THOUSAND NINE

AT

SUTTON, WEST VIRGINIA

BORN: FEBRUARY 18, 1976
BORN AGAIN: MARCH 03, 2009

Gene N Miller

MINISTER, CHURCH OF CHRIST

Real Life Parenting Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Handling Anger

Granted: October 1, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Real Life Parenting Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Setting Rules and Limits

Granted: October 1, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Real Life Parenting Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Building Trust

Granted: September 24,2009

Tracie McHenry Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Coping With Anger

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have co pleted to satisfaction

A Cognitive-Behavior Workbook

Granted: September 9, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Men's Work

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Anger, Power, Violence and Drugs

Granted: September 11, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Men's Work

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Becoming Whole ~ Book 3

Granted: September 11, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Men's Work

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Growing up Male ~ Book 1

Granted: September 11, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Living Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Managing Money

Granted: September 24, 2009

Tracie M McHenry Correctional Counselor

Tracie McHenry, Correctional Counselor II

Living Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Refusal Skills

Granted: September 21, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

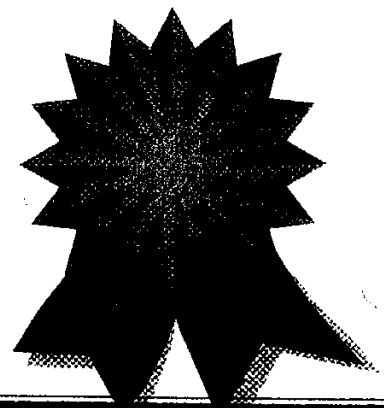
Living Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction



Values & Personal Responsibility

Granted: September 17, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Living Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Hygiene & Self Care

Granted: September 14, 2009

Tracie McHenry, Correctional Counselor II

Tracie McHenry, Correctional Counselor II

Living Skills

Certificate of Completion

is hereby granted to:

Arnold McCartney

to certify that they have completed to satisfaction

Making Decisions

Granted: September 14, 2009

Tracie McHenry Correctional Counselor II

Tracie McHenry, Correctional Counselor II